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THE
PRACTICE OF THE LAW

IN
ALL ITS DEPARTMENTS;
WITH A VIEW OF
RIGHTS, INJURIES, AND REMEDIES,

AS AMELIORATED BY RECENT STATUTES, RULES, AND DECISIONS;

SHOWING
THE BEST MODES OF CREATING, PERFECTING, SECURING, AND TRANSFERRING RIGHTS;
AND
THE BEST REMEDIES FOR EVERY INJURY, AS WELL BY ACTS OF PARTIES THEMSELVES,
AS BY LEGAL PROCEEDINGS; AND EITHER TO PREVENT OR REMOVE INJURIES;
OR TO ENFORCE SPECIFIC RELIEF, PERFORMANCE, OR COMPENSATION.

AND
THE PRACTICE
IN ARBITRATIONS; BEFORE JUSTICES; IN COURTS OF COMMON LAW;
EQUITY; ECCLESIASTICAL AND SPIRITUAL; ADMIRALTY; AND
COURTS OF APPEAL.

WITH NEW PRACTICAL FORMS.

INTENDED AS
A COURT AND CIRCUIT COMPANION.

—
IN TWO VOLUMES.

VOL. II.—PART I.

—
BY J. CHITTY, ESQ.
OF THE MIDDLE TEMPLE, BARRISTER.

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TO

THE THIRD PART.

It has been my intention, in the arrangement of this work, to observe *the natural order* of the subjects as they practically arise in the course of professional business. Therefore, in the preceding parts, we first considered the Private Rights of Persons and of Personal and Real Property, and their Injuries and Remedies in general; then the precautionary measures to improve or enlarge those rights, and to prevent or remove injuries;—next, the measures of redress by Private Individuals themselves, or their relations or friends; then the extent of summary relief by the assistance of Magistrates and other legal Functionaries; then the more formal preventions of Injuries by summary application to Justices or to Courts of Common Law, to obtain *sureties of the Peace*, or *Habeas Corpus*, or to a Court of Equity, to obtain an *Injunction*; and lastly, the modes of enforcing *specific performance* of a contract or duty, either by *Mandamus* or by Suit in the *Spiritual Court*, for Restoration of Conjugal Rights, or by *Bill in Equity*, and decree for a *Specific Performance*. These, together with the operation of the Statutes of Limitation, have all been considered in the preceding parts, constituting the *first Volume*.

In the same natural order of events, we are now to suppose that some description of *Litigation* to obtain compensation or punishment for an injury already

completed, has become inevitable, and must immediately be resorted to on the one hand, or on the other, defended. Here the first consideration will be the necessity for *retaining a Legal Agent*, and the circumstances which should influence the choice ; we are, therefore, naturally led, in the *First Chapter* of this Part, to consider the qualifications and professional duties principally of *Attorneys, Solicitors, Proctors, Notaries, Special Pleaders, and Barristers* ; and we have attempted to collect and arrange some rules for their education and conduct, the observance of which will unquestionably negative any supposition that they can act otherwise than becomes a Profession which ought to be as *honorable* as it is *influential*. I confess, that when I first approached this part of the subject, and recollected that I had met with some instances where the semblance of interest having been placed in one scale, and honor in the other, the latter had kicked the beam, a passing doubt arose whether I might not be assuming to prescribe rules too strict for the present state of Society ; but, as I proceeded, and passed in review, the majority of honorable characters well known to me, I have the gratification of declaring that their practice accords with those rules ; and I can, without hesitation assert, that every Student in the Law should observe and act up to them. And, considering how much the well being of Society depends on the honorable practice of this very numerous and influential body of men, I apprehend the examination and practical application of all these rules will be found to be of the utmost importance.

In the *Second Chapter* are collected all those rules, the non-observance of which too frequently occasions disastrous defeat at advanced stages of litigation, *viz.*, the necessity for, and modes of ascertaining who

ought to be the *plaintiff* or complainant, and who the *defendant*; also the precise nature of the cause of complaint, essential to be known in order to apply the best remedy, and the evidence of these, and how that is to be obtained or secured; and of Bills of Discovery in general, and the costs thereof. Then the just contrivances to obtain a legal security in lieu of one defective. The expediency of a formal letter or demand from the attorney before the commencement of any proceeding; offers of apology or compromise, or of further security, and how those offers are to be treated; and, in short, the consideration of all those circumstances, the careful attention to which constitute the difference between a really skilful and efficient lawyer, and one who barely knows the ordinary routine of practice. Then are considered certain formal steps, as notices, tenders, and demands in general; demands of the perusal and copy of a Justice's warrant, notices of action to Justices of the Peace and other public officers, and notices of an attorney's or solicitor's lien; then is given an enumeration or outline of the several remedies by legal proceedings for injuries, and concise directions for the choice of the best, and the expediency of retaining a Counsel who is supposed to be most effective and influential, at the place of trial.

The *Third Chapter* relates to a subject of the very greatest practical importance, viz. *Arbitrations*. The slovenly and careless manner in which these have been too frequently conducted, is disgraceful to an intelligent Profession, and the consequent accumulation of expense is equally ruinous to the parties. I have therefore given this subject particular consideration, in the hope that the arrangement and suggestions may tend to an amelioration of the practice. The very

important provisions of the recent act, 3 & 4 W. 4. c. 42, rendering the jurisdiction of Arbitrators more efficient, are practically applied; and new forms to be observed have been suggested in the notes.

In the *Fourth Chapter* I have considered it of essential importance, not only to *Justices of the Peace*, but to *Attornies* and *Private Individuals*, especially country gentlemen, to give an entirely new view of the proper mode of conducting *Summary Proceedings*, as well antecedent as subsequent to *conviction*. The recent enactments, it will be found, have introduced considerable alterations and improvements, and the jurisdiction is of very extensive application; but as yet there is no treatise shewing the practical operation of the four recent acts which afford summary redress for almost every description of *small private or public injuries*, viz. the 9 Geo. 4. c. 31, relating to common assaults and batteries, and which enable *two* Justices to convict in a penalty of 5*l.*,—the 7 & 8 Geo. 4. c. 29, relative to small injuries to personal or real property, in the nature of stealing, though not amounting to *larceny*, and which enables *one* Justice to convict in a penalty of 5*l.*,—the 7 & 8 Geo. 4. c. 30, enabling *one* Justice to convict in a penalty of 5*l.* for any *wilful or malicious injury* to private or public personal or real property,—and the 1 & 2 W. 4. c. 32, enabling *one* Justice to convict in a penalty of 2*l.* for any *trespass* in pursuit of *Game*. These acts, it will be found, are throughout the country of great practical utility, and remove the necessity for trifling actions and prosecutions for comparatively small injuries.

But these constitute a subordinate part of this Chapter, which contains the *whole practical mode* of conducting a *summary proceeding*, from the *information* to the *conviction*, and also the proceedings upon *appeal*

against the same, and the removal thereof by *certiorari* into the Court of King's Bench. In the notes, *new forms* are introduced, to assist Magistrates in their practical proceedings.

This Chapter concludes with the summary proceedings in cases of *Forcible Entries*, and *Detainers*, and cases between *Landlord and Tenant*, as where the latter, owing half a year's rent, has *deserted* the premises, or has been guilty of a *Fraudulent Removal*, or retains possession of *Parish Property*; and the wholesome proceedings before Justices, where a tenant has been oppressed by exorbitant charges of distress. It is hoped that the perusal of this last Chapter, collecting and arranging all the recent enactments and decisions, may assist and render more secure Justices of the Peace in the performance of their very important and arduous duties.

To facilitate access to every part of this Work, the following *Table of Contents*, referring to each distinct subject, is given, and at the end there is a *full Index*.

J. C.

Chambers, 6, Chancery Lane,
Dec. 20th, 1833.

TABLE OF CONTENTS

OF

VOL. II. PART I.

CHAPTER I.

OF RETAINING A LEGAL AGENT.—OF ATTORNIES, SOLICITORS, PROCTORS, CERTIFICATED CONVEYANCERS AND NOTARIES, AND OF SPECIAL PLEADERS AND BARRISTERS Pages 1 to 45

	Page		Page
I. REASON why a regularly admitted Lawyer must be retained	1 to 4	II. Of Attornies and Solicitors (<i>continued</i>).	
II. Of Attornies and Solicitors,	1 to 34	Conduct with respect to Negotiations	24
Qualifications of	1 to 15	Other Duties	<i>ib.</i>
Twenty-two points to be observed	4	Impropriety of increasing Expenses	25
Articles of Clerkship	5	Duty to expedite	<i>ib.</i>
Suggested improvements in	6 to 9	Stipulations for Remuneration out of the usual course illegal	26
Points to be observed before execution of	10	Construction of 2 G. 2. c. 23, s. 23., as to the necessity of delivering Bill	28
Service under Articles, and Affidavit of same	6 to 12	What Charges not within the Act	29
Examination before Admission	12	When illiberal to tax	30
Education and Study recommended	13	When the Delivery of a Bill is unnecessary, and how Client then to proceed	<i>ib.</i>
When want of Qualification will prejudice Client	15	Liabilities of Attornies, &c.	32
Rules in selecting an Attorney, &c.	16	III. Of PROCTORS	34
Purchaser not to employ Vendor's Attorney	17	IV. Of CERTIFICATED CONVEYANCERS	34
When an Attorney should not afterwards act against Client	18	V. Of NOTARIES	36
Written Retainer advisable	<i>ib.</i>	VI. Of STUDENTS for the BAR, SPECIAL PLEADERS, CONVEYANCERS, and BARRISTERS	37
Express Stipulation for due Care, when advisable	20	Of each becoming a Member of an Inn of Court	39
Attorney or Solicitor not to disclose Client's Communications	<i>ib.</i>	Their Studies and Attainments, as well in law as otherwise	41
Forms of Retainers	<i>ib.</i>	Some of the functions of Special Pleaders and Barristers	42
Duty of Attorney, Solicitor, or Proctor, to ascertain Facts, Evidence and Law, before proceeding	21	In giving Opinions	43
Duty in preparing a Case and obtaining Opinion	22	In framing Pleadings	44
Duty of principal Attorney or Solicitor himself to conduct proceeding, and not to delegate to a Clerk	23		

CHAPTER II.

PROCEEDINGS BETWEEN THE RETAINER AND THE COMMENCEMENT OF LITIGATION. 46 to 72

	Page		Page
I. Who to be considered injured, and who to sue.....	47	XII. Notices of Action	63
II. Who the Wrong Doer, liable to be sued, and Mode of Discovery ...	48	Notices to Justices in particular	<i>ib.</i>
III. What the Cause of Action, and Mode of Discovery	52	Decisions on Statutes	64
IV. What the Evidence, and Mode of Discovery.....	53	Who a Justice.....	<i>ib.</i>
V. Bills for Discovery, and Costs .	54	The intended Writ, how described.....	65
VI. Of obtaining a more perfect Security.....	55	What Facts and Damage must be stated	<i>ib.</i>
VII. Letter before Action, &c.	56	Recommended Form of Notice	66
His written Demand of Interest under 3 & 4 W. 4. c. 42, s. 28	57	Legal Objections unnecessary to be stated .	67
VIII. Apologies and Compromises .	<i>ib.</i>	Form of Action need not be stated	<i>ib.</i>
IX. Giving Time, and on what Security.....	59	To whom Notice addressed, and how served .	<i>ib.</i>
X. Notices, Tenders, and Demands	60	Indorsement.....	68
XI. Demand of Perusal and Copy of Justice's Warrant .	61	Other peculiar Protections in different Statutes.....	<i>ib.</i>
Form thereof	62	When the Month expires... General Precautions in case of Local Acts	69 <i>ib.</i>
		XIII. Attorney's Notice of his Lien	<i>ib.</i>
		XIV. How to select one of several Remedies..	70
		XV. Expediency of retaining particular Counsel.....	71

CHAPTER III.

OF REFERENCES TO ARBITRATION, AND PROCEEDINGS THEREON, 73 to 126

I. Preliminary Observations.		III. Utility of Reference, to state Facts for Opinion of Court	78
When or not a reference expedient	73	IV. Distinctions between References at Common Law and under Statutes .	79
When proper	75	Effect of Arbitration under 9 & 10 W. 3. and 3 & 4 W. 4, c. 42. s. 39, 40, 41	80
When not	<i>ib.</i>	Statement of 9 & 10 W. 3. c. 15	<i>ib.</i>
Not when Defence is <i>stricti juris</i> , unless under qualified terms	76	Statement of 3 & 4 W. 4. c. 42. s. 39, 40, 41	82
II. Who may refer .	77		
When by Executors, Assignees, &c.	<i>ib.</i>		

	Page
V. Who to be arbitrator.....	83
Precautionary Provisions for a substituted Arbitrator .	84
How to act if Arbitrator re- fuse.....	ib.
VI. The Practice and Law of Ar- bitration	85 to 125
<i>First</i> , Terms of Submission...	85
Should stipulate for Sub- mission being made a Rule of Court	86
By an Agent, how framed	ib.
By Executors, Assignees, &c.	87
Power of Arbitrator li- mited	ib.
Other suggested Terms .	88
<i>Forms of Agreements of</i> <i>Reference</i>	88 to 93
1. By Agreement not under Seal	88
2. By Cross Bonds....	ib.
3. By Indenture	ib.
4. Form of Recital of Matters in Difference	ib.
5. Stipulation to abide by Award.....	ib.
6. General Power to Enlarge	ib.
7. Submission to be made a Rule of Court	89
8. Parties and Wit- nesses to be exam- ined on Oath	ib.
9. Costs of Action to abide the Event	ib.
10. All other Costs in discretion of the Ar- bitrator	ib.
11. Proviso that an A- ward signed by Two or Three Arbitrators to suffice	ib.
12. Power to appoint fresh Arbitrators or Umpire, and for the latter to award with- out a further Meeting	ib.
13. Extensive Power to Enlarge	ib.
14. Power to regulate or fix the Terms on which a Nuisance may be continued...	ib.

	Page
VI. The Practice and Law of Arbi- tration (<i>continued</i>).	
<i>Forms of Agreements of</i> <i>Reference (continued)</i> .	
15. Order of Reference of an Indictment for Nuisance	90
16. Stipulation against Revocation by Death, Marriage, Bankrupt- cy, &c.	ib.
17. Stipulation that the Death of the Arbi- trator shall not re- voke, &c.	ib.
18. Power to examine Parties and Witen- esses on Oath ..	ib.
19. Stipulation to state a candid and explicit account of Claims, and produce Docu- ments	ib.
20. Stipulation that the Arbitrator shall ex- pressly upon the face of his Award adjudi- cate separately upon each Claim	ib.
21. Stipulation that the Arbitrator shall if re- quired state the Evi- dence and Points of Law on the face of his Award	90
22. Power to award Costs of Delay	91
23. Power to proceed <i>ex parte</i> in case of absence, or not bring- ing forward Evidence	ib.
24. Power to proceed <i>ex parte</i> in a fuller form	ib.
25. Agreement to pre- vent an Executor from being liable without Assets	ib.
26. Power to award the Entry of a Judg- ment to secure Pay- ment.....	ib.
27. Stipulated Damages to be paid, in case of	

	Page		Page
VI. The Practice and Law of Arbitration (<i>continued</i>).		VI. The Practice and Law of Arbitration (<i>continued</i>).	
<i>Forms of Agreements of Reference (continued)</i> .		<i>Tenthly, Examination of Witnesses, and Evidence of the Parties</i>	101
unreasonable Delay by either Party.....	92	<i>Eleventhly, Mode of taking the Evidence</i>	102
<i>When no Amendment of Terms allowed</i>	89, 90	<i>Twelfthly, Of Revocations of Arbitrator's Power</i>	<i>ib.</i>
<i>Secondly, The Affidavit of Execution of Agreement</i> ...	91	In general	<i>ib.</i>
Form thereof	92, note (q)	By Marriage.....	103
<i>Thirdly, Making Submission Rule of Court</i>	92	By Death	<i>ib.</i>
<i>Fourthly, Appointment of Umpire</i>	93	Bankruptcy, its effects	104
Form of Arbitrator's Appointment of an Umpire	93, 94	<i>Thirteenthly, Of the Award or Certificate</i>	105
<i>Fifthly, The Meetings and securing the Attendance of Witnesses</i>	94	Must conform to Authority	<i>ib.</i>
Necessity for written Appointments of Meetings	94	Must decide upon all sustainable Claims referred .	106
Form thereof	94, in n.	To do an impossible or illegal Act, when valid	107
Form of Peremptory and Final	<i>ib.</i>	Must be final, and when deemed so	<i>ib.</i>
Hearing and Production of Evidence at the first Meeting	94	When not certain, or final, or defective, because it does not order Payment .	108
Meetings to be absolutely effectual	95	A legal Arbitrator may decide contrary to strict rules of Evidence or Law	<i>ib.</i>
Notices of the appointed Meetings	<i>ib.</i>	As to awarding Costs	109
<i>Sixthly, Enlargement of Time</i>	96	<i>Forms of Awards</i> ..	111
Form of same	97	1. Common Form of Award, upon a reference of a Cause and all Matters in Difference	<i>ib.</i>
<i>Seventhly, Proceedings before Arbitrator</i>	<i>ib.</i>	Recital of Order of Nisi Prius	<i>ib.</i>
Form of Arbitrator's enlarging the Time for making his Award	97, in n.	Enlargement of Time .	<i>ib.</i>
<i>Eighthly, Enforcing Attendance of Witnesses, and Production of Documents, under 3 & 4 W. 4. c. 42, s. 40, and swearing Witnesses before Arbitrator</i> .	98	Hearing of Parties and Evidence	<i>ib.</i>
Form of Affidavit to obtain such Judge's Order or Rule ..	99	Of mutual Releases ...	114
Form of Judge's Order thereon	<i>ib.</i>	The Adjudication	111
<i>Ninthly, Of the Arbitrator's swearing the Witnesses</i> .	100	2. Award, subject to Facts for opinion of Court, with Report of Decision of Court thereon	112
Form of Oath of	101	3. Award, finding Facts and Adjudication for opinion of Court, resembling in form a Special Verdict ...	113
		When Award may be good in part, and void as to residue	114

	Page
VI. The Practice and Law of Arbitration (<i>continued</i>).	
Award, when published.....	115
<i>No Amendment of an Award</i> <i>ib.</i>	
<i>Fourteenthly</i> , Of a Certificate in lieu of an Award 112 to 114	
Form thereof	114, in n.
<i>Fifteenthly</i> , Of setting aside Awards.....	116
Upon what grounds — on Motion	<i>ib.</i>
When not.....	119
Exceptions in Practice	120
When Court will or will not set aside the Award on face thereof	<i>ib.</i>
Not after a Party objecting has adopted Award	<i>ib.</i>
Time within which to move to set aside	121

	Page
VI. The Practice and Law of Arbitration (<i>continued</i>).	
Practical Proceedings to set aside Awards	121
Submission must be made a Rule of Court	<i>ib.</i>
Rule Nisi, when must state the Objections	122
<i>Sixteenthly</i> , Proceedings to enforce Performance of an Award	<i>ib.</i>
1. By Attachment	<i>ib.</i>
How opposed	123
2. By Action	<i>ib.</i>
<i>Seventeenthly</i> , Jurisdiction in Equity	124
<i>Eighteenthly</i> , Of Arbitrations under other particular Statutes	125

CHAPTER IV.

SUMMARY PROCEEDINGS BEFORE JUSTICES OF THE PEACE FOR PRIVATE INJURIES, AND PENALTIES, AND PRACTICAL DIRECTIONS 127 to 251

I. THOSE OF A GENERAL NATURE.	
Preliminary Considerations.	
Summary of Proceedings for Private Injuries, and Penalties ..	127
When these are or not expedient	<i>ib.</i>
Original limited Jurisdiction of Justices of the Peace out of Sessions	128
Jurisdiction extended to cases of Contract	129
Extended to small private Injuries to Persons and Property	<i>ib.</i>
Objects of the recent Enactments	<i>ib.</i>
Rules of Construction as regards Summary Proceedings	130
Precautions in adopting Summary Proceedings.....	131
The four recent Acts separately considered	132 to 146
<i>First</i> , Cases of common Assault or Battery, un-	

I. THOSE OF A GENERAL NATURE (<i>continued</i>).	
der 9 G. 4. c. 31. s. 27.....	132, 143
Prescribed <i>Form of Conviction</i> , on 9 G. 4. c. 91	134
<i>Secondly</i> , Cases of stealing of Personal or Real Property of small value, as Trees, Fences, &c. not Felony nor Misdemeanor, on 7 & 8 G. 4. c. 29	135
Prescribed <i>Form of Conviction</i> , on 7 & 8 G. 4. c. 29 .	138
<i>Thirdly</i> , Cases of small wilful or malicious Injuries to Personal or Real Property, on 7 & 8 G. 4. c. 30, s. 24 ...	139
Prescribed <i>Form of Conviction</i> , on 7 & 8 G. 4. c. 30 .	142

	Page		Page
I. THOSE OF A GENERAL NATURE (continued).		II. PRACTICAL PROCEEDINGS to enforce Compensation for PENALTIES IN GENERAL (continued).	
<i>Fourthly</i> , Cases of Trespass against the Game Act, 1 & 2 W. 4. c. 32	142	<i>Fifthly</i> , Of the Information or Complaint (continued).	
Prescribed <i>Form of Conviction</i> on same	143	able in part, though bad as to residue	158
Construction and Operation of these Acts	ib.	Surplusage, when not prejudicial	ib.
Construction of Common Assault and Battery Act, 9 G. 4. c. 31	ib.	Substance of the usual Form	ib.
Construction of Petty Stealing Act, 7 & 8 G. 4. c. 29	144	When must be in Writing	ib.
Construction of Malicious Injury Act, 7 & 8 G. 4. c. 30	ib.	When on Oath	159
Construction of Game Act, 1 & 2 W. 4. c. 32	146	When may be brought to the Justice ready prepared	ib.
Similarity in most Statutes of this nature	ib.	<i>Consideration of each part of an Information.</i>	
II. PRACTICAL PROCEEDINGS to enforce Compensation for PENALTIES IN GENERAL	147	1. Name and Description of Complainant or Informer	160
<i>First</i> , within what Time must prosecute	ib.	2. Time of exhibiting Information	161
Month, how construed	ib.	3. Place of exhibiting	ib.
When first Day excluded	148	4. Names of Magistrates, and their Jurisdiction	ib.
<i>Secondly</i> , Who to prosecute	149	5. Whether or not on Oath	159
Summary Proceedings on Justice's own view	151	6. Name and Description of Offender	162
<i>Thirdly</i> , Against whom	ib.	7. Time of committing Offence	ib.
<i>Fourthly</i> , Before what Justice or Justices	152	8. Place of committing Offence	163
One Justice may issue Summons, even when two Justices must convict	154	9. Description of Offence	164
Justices not to be interested	ib.	Requisite particularity in such Statement	ib.
<i>Fifthly</i> , Of the Information or Complaint	155	When merely in words of Statute insufficient	165
Form and Strictness required in general	ib.	Should be as extensive as the facts will warrant	ib.
Statement of the usual Form of Information	156	Must charge Offence equal to that prohibited	166
<i>Form of Information</i> to be used in most cases 156, n. (h)		Must be positive, &c.	ib.
What Defects in Information aided	158, 170	Particular Words in the Statute, descriptive of Offence, when essential	ib.
Information, when sustain-		Averments negating Exemptions or Qualifications	ib.
		10. Conclusion, <i>Contra formam Statuti</i>	168
		11. <i>Contra Pacem</i>	169
		Several Counts for different	

	Page
II. PRACTICAL PROCEEDINGS, &c. (continued).	
<i>Fifthly</i> , Of the Information or Complaint (continued).	
Offences or varying Descriptions	169
Prayer that the Offender be summoned	170
Defects in Information, when aided	170, 158-9
<i>Several Forms of Informations</i> under recent Acts 171-2, in notes.	
1. Common Assault and Battery, on 9 G. 4. c. 31. s. 27	171
2. On 7 & 8 G. 4. c. 29, s. 40, for breaking a Dead Fence, with intent to steal the same	<i>ib.</i>
3. On 7 & 8 G. 4. c. 30, s. 24, for a wilful or malicious Injury	<i>ib.</i>
4. On Game Act, 1 & 2 W. 4. c. 32, s. 30, for a Trespass, in pursuit of Game	172
<i>Sixthly</i> , Oath to obtain Summons on recent Acts	171, 2, 3
Form thereof	173, n. (b)
<i>Seventhly</i> , The duty of Justices to receive an Information, and issue Summons or Warrant...	173
<i>Eighthly</i> , The Summons and requisites	174
Form of Summons, after Oath	177(c)
<i>Ninthly</i> , The Service of the Summons	177
<i>Tenthly</i> , Warrant to apprehend Offender	178
Form of Warrant.....	179, (q)
<i>Eleventhly</i> , Search Warrants ...	179
Form of Warrant to apprehend, to answer a summary Complaint or Information	179
<i>Twelfthly</i> , Of securing Evidence and Attendance of Witnesses on the Hearing.....	181
Form of Summons to Witness.....	182, (g).

	Page
II. PRACTICAL PROCEEDINGS, &c. (continued.)	
<i>Thirteenthly</i> , <i>The Hearing and Proceedings before one or two Justices, &c.</i>	182
Jurisdiction and Number of Justices	183
Non-attendance of Defendant, and Proof of Service of Summons	184
Of Confessions	<i>ib.</i>
Of Adjournments	185
Reading Information to Defendant, and his Objections thereupon.....	185
Right to appear by Counsel or Attorney, and have their <i>private</i> assistance...	186
Right of third person uninterested to be present, but not to take notes	187
<i>The Evidence and Witnesses</i>	188
Oath of Witness	<i>ib.</i>
Mode of Examination, &c. .	189
Mode in which Evidence must be taken down.....	<i>ib.</i>
The Defence.....	191
Evidence in support of Defence.	<i>ib.</i>
Defence under <i>bond fide</i> Claim of Right	<i>ib.</i>
<i>Fourteenthly</i> , Of postponing Decision of Justices, and necessity for Presence of all the convicting Justices <i>together</i> at Time of deciding	192
<i>Fifteenthly</i> , Of Amicable Adjustments and Compromises by the Intervention of Justices ...	193, 4
<i>Sixteenthly</i> , <i>The Decision, Acquittal or Conviction, by Justices</i>	194
1. <i>Acquittal</i> , and Record or Certificate thereof.....	<i>ib.</i>
Formal Judgment of Acquittal	<i>ib.</i>
Certificate of Dismissal under 9 G. 4. c. 31. s. 27, 28	195
2. <i>Convictions</i>	<i>ib.</i>
Time of Delivery of Copy or returning Original to Sessions	196

	Page
II. PRACTICAL PROCEEDINGS, &c. (continued.)	
<i>Sixteenthly, The Decision, &c. (cont.)</i>	
3. <i>Form of Conviction, as prescribed by 8 G. 4. c. 23. s. 1.</i>	196
4. <i>Formal Part and Requisites of Convictions in general.</i>	<i>ib.</i>
5. <i>Requisites of Conviction in general.</i>	
1. <i>When prescribed Form imperative, and consequences of Deviation</i>	198
2. <i>Recital of Information.</i>	<i>ib.</i>
3. <i>Statement of Appearance and Defence</i>	199
4. <i>Of Confession</i>	<i>ib.</i>
5. <i>Of Evidence</i>	<i>ib.</i>
6. <i>Of stating Evidence for Informer</i>	200
7. <i>Mode of stating Evidence for a Defendant</i>	201
8. <i>What Evidence on face of Conviction sufficient to sustain it</i>	202
9. <i>The Form of Adjudication in general</i>	<i>ib.</i>
10. <i>As to Adjudication negating Exceptions</i>	203
11. <i>Statement of the Offence in Adjudication</i>	204
12. <i>Certainty in stating the Offence</i>	205
13. <i>Uncertainty in Information, when aided by Conviction</i>	<i>ib.</i>
14. <i>Conviction of several Offences</i>	<i>ib.</i>
15. <i>Adjudication as to Forfeiture, Punishments, &c.</i>	206
16. <i>As to Distribution or Application of the Penalty</i>	207
17. <i>As to Costs</i>	<i>ib.</i>
18. <i>Conclusion of Conviction, and the Date, Signing and Sealing</i>	208

	Page
II. PRACTICAL PROCEEDINGS, &c. (continued).	
<i>Seventeenthly, Conviction upon particular Statutes</i>	209
<i>Eighteenthly, Defects in Convictions in general, where aided</i>	210
<i>Nineteenthly, Delivery of Copy of Conviction to Defendant, and returning original Conviction to Sessions</i>	211
<i>Twentiethly, Enforcing the Payment of Penalty or Punishment</i>	212
1. <i>In general, by what Process</i>	<i>ib.</i>
2. <i>By Distress Warrant, when No Replevin lies</i>	<i>ib.</i>
3. <i>By Warrant of Commitment</i>	<i>ib.</i>
<i>Twenty-firstly, Appeal to Sessions</i>	214
1. <i>Recognizance</i>	215
<i>Form of, under Game Act, 1 & 2 W. 4. c. 32.</i>	215, 216
2. <i>Notice of Appeal</i>	216
3. <i>Form of Judgment of Affirmance of the Sessions, on an Appeal against Conviction, under 1 & 2 W. 4. c. 32</i>	216, 217
<i>Costs of Appeal</i>	217
<i>When the fact of Sessions quashing Conviction, not conclusive</i>	<i>ib.</i>
<i>Mandamus to compel Justice to state Evidence, &c. in Conviction, under 3 G. 4. c. 23</i>	218
<i>Twenty-secondly, Of Writs of Certiorari</i>	219
<i>Time within which Writ must be moved for, and the Notice thereof required</i>	221
<i>Notice of Motion for Writ, and Affidavit of Service thereof</i>	222-23
<i>Form of Notice</i>	223, n. (d)
<i>Affidavit in support of Motion for Certiorari</i>	223
<i>Form of such Affidavit</i>	224
<i>Grounds on which Court will or not allow a Certiorari</i>	<i>ib.</i>
<i>Recognizance, proper Form of</i>	225

	Page
II. PRACTICAL PROCEEDINGS, &c. (continued)	
Twenty-secondly, Of Writs of Certiorari (continued).	
Execution to enforce a Con- viction after it has been affirmed	226
Liability of Accuser	227
Liabilities of Justice	228
Protection to Justices	230
OTHER SUMMARY PROCEEDINGS	231
Twenty-thirdly, IN CASES OF FORCIBLE ENTRY AND DE- TAINER	ib.
Prevention of Waste pend- ing Legal Proceedings	233
Jurisdiction of Justices in cases of Forcible Entry and Detainer	ib.
Forcible Entries and Forci- ble Detainers after such Entries	234
Proceedings in case there is no Continuance of the Force in view of the Jus- tice	235
Forcible Detainers	236
Practical Proceedings in case of Forcible Entry and Detainer	240
Certiorari to remove Con- viction	241
Twenty-fourthly, IN OTHER CASES, AS BETWEEN LANDLORD AND TENANTS	ib.
1. Premises deserted, and Half a Year's Rent in ar-	

	Page
II. PRACTICAL PROCEEDINGS, &c. (continued.)	
rear, and no sufficient Distress, on 11 G. 2. c. 19, s. 16, 17, and 57 G. 3. c. 52	241
Practical Proceedings on same	243
2. Fraudulent Removal, and Justice's Assistance, 11 G. 2. c. 19, s. 4, 5, 6, 7	245
Oath and Warrant to authorise the break- ing a Dwelling-house to seize Goods frau- dulently removed there to prevent a Distress for Rent, under 11 G. 2. c. 19. s. 7	248
3. Summary Remedy by Justices, where <i>Paupers</i> , occupying as such, retain Possession after Permis- sion withdrawn, under 59 G. 3. c. 12, s. 24, 25	249
4. Justice's Assistance, in case of <i>exorbitant Charges</i> upon a Distress for Arrear of Rent not exceeding 20l., 57 G. 3. c. 93	250
Summary Proceedings before Justices, under the Laws relating to Customs and Excise	251
Conclusion	ib.

THE PRACTICE OF THE LAW, &c., &c.

PART THIRD.

CHAPTER I.

**OF THE RETAINER OF A LEGAL AGENT.—AND OF ATTORNIES,
SOLICITORS, PROCTORS, CERTIFICATED CONVEYANCERS AND
NOTARIES,—AND OF SPECIAL PLEADERS AND BARRISTERS.**

<p>I. REASONS why an admitted LEGAL AGENT should be retained - 1</p> <p>II. OF ATTORNIES and SOLICITORS 4</p> <p style="padding-left: 20px;"><i>First</i>, Of the retainer of an attorney, &c. - <i>ib.</i></p> <p style="padding-left: 20px;"><i>Secondly</i>, The Qualifications of an attorney, &c. - <i>ib.</i></p> <p style="padding-left: 40px;">1. The articles of <i>clerkship</i> and terms thereof suggested - 5</p> <p style="padding-left: 40px;">2. Points to be observed before the execution of articles - 10</p> <p style="padding-left: 40px;">3. What service is requisite - <i>ib.</i></p> <p style="padding-left: 40px;">4. Affidavit of service - 11</p> <p style="padding-left: 40px;">5. Examination as to fitness and admission - 12</p> <p style="padding-left: 40px;">6. Of the <i>education</i> before and pending articles - 13</p> <p style="padding-left: 20px;"><i>Thirdly</i>, When want of qualification may prejudice client - 15</p> <p style="padding-left: 20px;"><i>Fourthly</i>, Precautions to be observed in retaining an attorney in general, &c. 16</p> <p style="padding-left: 40px;">Purchaser not to employ vendor's attorney - 17</p> <p style="padding-left: 40px;">Attorney, when not afterwards to be concerned against client - 18</p> <p style="padding-left: 20px;"><i>Fifthly</i>, Propriety of written retainers - 20</p>	<p style="padding-left: 20px;"><i>Sixthly</i>, Duty of attorney <i>properly</i> to state a case and obtain opinion of counsel - 21</p> <p style="padding-left: 20px;"><i>Seventhly</i>, Where principal attorney, to conduct the proceedings <i>himself</i> - 23</p> <p style="padding-left: 20px;"><i>Eighthly</i>, His duty in negotiations - - -</p> <p style="padding-left: 20px;"><i>Ninthly</i>, Other duties. - 24</p> <p style="padding-left: 20px;"><i>Tenthly</i>, His remuneration and costs - 26</p> <p style="padding-left: 20px;"><i>Eleventhly</i>, His liabilities - 32</p> <p>III. OF PROCTORS - 33</p> <p>IV. OF CERTIFICATED CONVEYANCERS - 34</p> <p>V. OF NOTARIES - 35</p> <p>VI. OF STUDENTS, SPECIAL PLEADERS, and BARRISTERS - 36</p> <p style="padding-left: 20px;"><i>First</i>, Becoming a member of one of the Inns of Court, and being called to the bar - - -</p> <p style="padding-left: 20px;"><i>Secondly</i>, Of their studies and attainments - 39</p> <p style="padding-left: 20px;"><i>Thirdly</i>, Of some of the functions of a Special Pleader and Barrister, as regards Chamber Practice, and particularly in giving opinions - 42</p>
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IN the preceding parts of this work we have considered some subjects connected with litigation, many of which might, perhaps, although rarely with security, be conducted without the actual assistance of a professional adviser. But we are now to suppose that an injury having been completed, compensation cannot probably be obtained without some description of formal litigation. Here, however well informed the party injured, or the wrong doer may be, yet experience has established that in

CHAP. I. REASONS FOR RETAINING A LEGAL AGENT.

1. Reasons why some regularly educated and admitted *legal* agent must be retained in certain professional business.

CHAP. I.
REASONS FOR
RETAINING
A LEGAL
AGENT.

general it is most prudent to employ some *Professional Agent* to conduct the proceeding, as well to avoid personal collision with the opponent, as to secure a temperate and discreet line of conduct which otherwise might be prejudicial, especially during the trial or hearing of a cause. (a) Besides, there are so many technicalities in the course of legal proceedings, that even the most experienced barrister would probably commit some blunder in the *practical* steps, if he should attempt to conduct his own suit through the different offices and stages of litigation, however superior he might be in his own particular department, i. e. in argument and discussion in court or before a jury, to which, in the course of his particular department, his attention has usually been confined. (b)

The authorized agents in legal proceedings, especially in conducting a suit to trial or hearing, are *Attorneys at common law*, *Solicitors in equity*, (c) and Proctors in the *Spiritual* and *Ecclesiastical* Courts; whilst in preparing certain notarial and commercial proceedings, *Notaries* are employed; and *Conveyancers*, either at the bar or *certificated* (in the latter case usually termed *Certificated Conveyancers*), principally prepare conveyances, deeds, contracts, and wills, when attended with any difficulty or of considerable importance.

When *Advice* is required upon the *rights* of the parties or the *practical proceedings* or *evidence* beyond that which the attorney or solicitor thinks himself competent to give, special pleaders or, in more weighty matters, barristers are usually consulted upon a verbal, or more frequently upon a formal written statement.

Barristers, frequently called *counsel*, are also retained to state to the Courts of *Law*, on motions and other proceedings; or on *trials*, to the judge and jury; or in Courts of *Equity*, on motions or hearings to the Chancellor or other Equity Judge, bills and answers or affidavits, and to argue in support of the the client's interest upon the result.

(a) In general, a party in a cause is under too much excitement to conduct it himself with due temperance and discretion; and although there are exceptions where a few talented individuals seem even to have derived advantage from their irregularities or non-observance of technical rules, yet any one acquainted with Courts of Justice well knows, that in general a party undertaking the conduct of his own case greatly prejudices it.

(b) It is, however, still competent to a party in a *civil suit*, to sue or defend for *himself* in person. *La Grue v. Penny*, 2 Hen. B. 600. *Ward v. Netherlote*, 7 Taunt. 145. But this does not extend

to prosecutions of *criminal charges*; and even a motion for a criminal information cannot be made by a private individual in person. *Rex v. Justices of Lancashire*, 1 Chitty's Rep. 602.

(c) It is a vulgar error that the term *solicitor* is more honourable, or superior to that of *attorney*. Lord Tenterden repeatedly animadverted upon the absurdity of using the former term or name, when applied to any one conducting an *action* or other proceeding in Courts of *Law*. There is no distinction in the degree of respectability, any more than there is between Barristers practising in one Court or the other.

With respect to the *exclusive right* of these several legal agents to conduct such proceedings on the behalf of their clients, some disappointed individuals have ever been found to decry all prohibitory regulations which tend to exclude or rather *delay* talented individuals who have attained manhood from gaining subsistence in the department of the law, because they have omitted in early life to qualify themselves by regular apprenticeship or articles, or study as members of one of the Inns of Court, or to conform to what they would term arbitrary regulations. As respects most departments of science, as for instance that of the medical profession, the propriety of similar exclusion has been frequently and ably argued. (d) It may suffice here to observe, that it is but just that those who have devoted many years of their youth in expensive education and regular moral habits, for the express purpose of obtaining admission to practice in the law, ought to be protected from the inroads of even the most talented adventurers, who, if they were without similar discipline, allowed to practise, would frequently, from adventitious circumstances become popular, and supplant the more regular practitioners. Besides, as professional men have great influence in society, not only as regards property, but in counteracting the litigious inclination of their clients when so disposed, (e) it is but fit that before a party be admitted to practise, his *moral* character as well as his *legal skill*, should long have been under control or observation, and that he should be well examined respecting each, and approved by some competent tribunal; and as regards barristers in particular, who from the nature of their avocation must aggregate and be constantly in collision with each other, it is peculiarly essential that there should be some at least probable security, that each member of their fraternity has been duly educated, and is influenced in his conduct by all the principles becoming a gentleman; for otherwise the society of some of the members of the profession would soon become intolerable. At the same time it must be admitted, that the Judges who have to decide upon the fitness of a clerk to be admitted to practise as an attorney or solicitor, and the benchers of the Inns of Court who have to determine on the propriety of admitting a gentleman to the bar, have a delicate and anxious office to fulfil; since, after

(d) See Gray's Pharmacology, 4th edit. A. D. 1828. Preface, per tot. &c.

(e) Some might suppose this expression ironical; but experience establishes that by far the greater proportion of respectable attorneys and solicitors, especially those practising in the country,

preferring general good character to the petty gains incident to trifling litigation, do most materially contribute to harmonize their neighbours, and confine litigation to questions of real importance.

CHAP. I.
REASONS FOR
RETAINING
A LEGAL
AGENT.

a youth has devoted five years of expensive study with a view to admission in the particular department, it would be painful to blight his prospects by rejecting him without strong and almost imperative reasons, either on account of total and dangerous inability or grossly immoral conduct, rendering the individual unfit to be entrusted with the interests of third persons. And on this ground, as far as regards students for the bar, the benchers of the Inner Temple have introduced a wholesome regulation for examining a youth upon his classical education and his probable fitness, even before he can be admitted as a *student*; so that if he be rejected thus early, he will not have to complain of the loss of time or intervening expense.



II. OF ATTOR-
NIES AND SOLI-
CITORS.

Principal regu-
lations to be
observed effi-
ciently to be-
come an attor-
ney or solicitor.

It is not my intention here to attempt to state in detail all the law relating to the admission, enrollment, certificates, or re-admission of attornies or solicitors, or to their privileges, disabilities, and duties, or the consequences of their misbehaviour. These have been ably collected and commented upon by Mr. Tidd, in his scientific Treatise on Practice; (f) and in some minor essays, in imitation of that excellent standard work. I shall here, pursuing my elementary plan of *anticipating* and *preventing* inconveniences or injury, and principally with a view to advise the parents of *articled clerks*, and themselves, how to avoid delay or other inconvenience, merely state the *principal regulations*, the non-observance of which might wholly defeat the utility of the articles, and preclude a clerk after his five years' services from being admitted; together with those rules and decisions which have either been omitted in prior treatises, or too lightly touched upon; and I propose to introduce some observations on the *previous education* of articled clerks, as well as that to be pursued *during* their clerkship; and upon the *duties* of all practitioners as prescribed by different judges, and here suggested for their improvement, and through them ultimately for the benefit of the community.

Twenty-two
points to be
observed.

The whole of the proceedings to be taken to enable a person to practise legally as an *attorney or solicitor*, may be arranged in the order in which they naturally arise, as 1, the *master*, who must be a regular practising attorney; 2, the articles of clerkship; 3, the stamp thereon; 4, the affidavit of the execution of the articles to be filed within *three months* after their date; 5, the entry of such affidavit; 6, the enrolment of the articles with the affidavit of the execution *within six months*,

(f) Tidd's Practice, 9 ed. chap. iii. to 340.
p. 60 to 90, and *id.* Chap. xiv. p. 319

and the registry of the former; 7, the affidavit of such enrolment and of the payment of the duty; 8, the service under the articles; 9, the necessity for fresh articles to make up for any lost time; 10, the affidavit of the regular service; 11, the master's certificate of regular service, which although usual, may be dispensed with; 12, the notice of the clerk's intention to apply for admission, to be affixed outside the Court; 13, the entry of such notice at the judges chambers; 14, the examination before the judge; 15, the petition and affidavits to obtain admission in case of difficulty; 16, the oaths to be taken, and swearing the same; 17, the stamp on admission; 18, the admission itself; 19, the enrolment of the name of the admitted attorney on the rolls of the Court; 20, the entry of the name of the admitted clerk, and of the place of abode; 21, the annual certificate and stamp duty thereon; and, 22, the entry of the certificate with the proper officer of the court. Of these it will be obvious, that the most important are the *first eight*; because their non-observance may render a fresh binding essential, and indeed, as regards the latter, the information which the clerk will obtain during his articles, will probably enable him to prevent any material error or inconvenience.

With respect to attornies and solicitors, no person can be *admitted to practise* as such, “unless he has been bound by *contract in writing* to serve as a clerk for and during the *space of five years* to an attorney or solicitor, duly and legally sworn and admitted in one of the Superior Courts at Westminster, or in some Court of Record in England,” as mentioned in the act. (g) The full term of five years must be *prospective*, and the articles must not be antedated nor executed after the five years have commenced; this results from another statute, requiring an affidavit of due service during the *whole* term, as presently noticed. It is suggested and recommended, that to provide for the possibility of unforeseen circumstances arising, that might occasion some absence during the prescribed term, and prevent the possibility of the party truly swearing to a service during the *whole* of the term of five years, and render it necessary to have a new contract of binding to make up such full term, it is prudent to bind the clerk, in the first instance, for a term *rather more than* five years, as for instance, for *six* years, with a proviso and covenant, that after the clerk has duly and actually served *full five years* of that term, he shall be at liberty to depart and obtain his admission, and that the master will assist and facilitate his obtaining the

First of the
Articles.

(g) 2 Geo. 2. c. 23, sect. 5 and 7, made perpetual by 30 Geo. 2, c. 19.

CHAP. I.
OF ATTORNIES
AND
SOLICITORS.

same ; (h) for otherwise, in case of wrongful absence during any part of the limited term of five years, the requisite affidavit of service could not safely or conscientiously be made ; and it would be necessary to have *fresh* articles for a *further* term, sufficient with the previous actual service to make up for such lost time, (i) and not a mere *assignment* of the first articles ;

(h) See *Ex parte Tench*, K. B. Trin. T. 1827, where the applicant had been articted for *six* years, and had, during that term, actually served although at *different* times, more than five years, taken collectively, though he had been wrongfully absent at other parts of the term ; and it was holden per Bayley, J. that his

affidavit of such *partial* service was sufficient to entitle him to his admission. K. B. on motion of Chitty. See Chitty's ed. Stat. p. 66, note (o). And see the affidavit and rule in the proper office. In case the binding should be for more than the term of five years, then the suggested proviso may be thus.

Suggested
clause in arti-
cles for more
than five years,
that after due
service for *five*
years, the clerk
may be admit-
ted to practise
for himself.

" Provided always, and it is hereby declared, covenanted, and agreed by and between the said parties, that when, and *as soon* as the said C. D. shall have *duly* served the said A. B., or his assigns, or any other person that shall or may by rule or order of any Court, or otherwise according to law, have become his master, under and by virtue of these presents, or under any other lawful contract, in the whole for and during the full term of five years, part of the said term of years hereinbefore mentioned, and according to the true intent and meaning of these presents, and also as required by the statutes and rules in that case made and provided ; then it shall and may be lawful for the said C. D. to give one week's notice, in writing, to the said A. B., or his then master for the time being, of his desire and intention no longer to serve him or any other person under such articles, or under any such other contract, and from and after the expiration of one week from the time of the due service of such notice, it shall and may be lawful for the said C. D. thenceforth to depart and continue absent from any further service under these presents, or such other contract, and from thenceforth the said article, and other contract, shall cease to be obligatory on the said C. D. as to any prospective purposes ; and thereupon the said A. B., and his executors, administrators and assigns, and any new master, shall and will, at the request, costs and charges of the said C. D., sign such certificate, and execute, do and perform all such acts that shall or may be requisite, useful, or advisable, to enable the said C. D. to be admitted to practise for himself as an attorney or solicitor."

(i) In case further articles or a fresh contract should be necessary, then the same should be framed, reciting the former articles, and the substance of

the covenants therein, and should then recite the past service under the same, and the event which has rendered it necessary to have a new contract, as thus :

Terms of new
articles to make
up for lost time.

" And whereas, in pursuance and under and by virtue of the said articles, the said C. D. did duly and faithfully serve the said A. B. as such articted clerk as aforesaid, in part performance of the same articles, and the covenants therein contained, and the statutes and rules relating to and requiring such service, upon and continually from the said — day of —, A. D. —, until and upon the — day of —, A. D. —, making in the whole the term of — years and — months and — days, of faithful and sufficient service of the said C. D., under and in pursuance of the said articles. And whereas, upon the — day of —, A. D. —, the said C. D. absented himself from the service of the said A. B., under and in pursuance of the said articles [if an excusable or not culpable cause, *state it*, but otherwise, let the recital be general, as follows], and ceased and neglected duly to serve as such clerk from that day until the time of the execution of these presents. And whereas, the said A. B. and C. D. and E. F., his father, are respectively desirous that the said C. D. should be bound to serve, and should duly serve as such clerk, under and in pursuance of sufficient articles, and for and during such a time and term as will enable and entitle him to be admitted to practise as an attorney and solicitor ; and for that purpose the said C. D. and E. F. have requested the said A. B. to receive and retain him to serve accordingly, and to execute fresh articles of clerkship for that purpose ; and which the said A. B. hath consented to do. Now therefore, &c." [here state the new binding to commence from the time of executing the fresh articles, and for a term fully sufficient, and even more than will be requisite to complete the full term of five years faithful service, and insert the like covenants for faithful services as in the original articles, and proviso for cesser, as *supra*, in the first form.]

and such fresh contract must be stamped with the same duty as was payable on the original articles; and though the stamp on the first articles would be allowed on delivery up of such original articles to the Commissioners of Stamps within six months after execution of the new articles; (*k*) in the mean time there must have been an advance of the amount, and the consequence of the irregularity would be attended with at least temporary anxiety and some trouble and extra expense, which by an original binding for *six* years would have been avoided.

It should seem, that in strictness, whenever the original binding is for *five* years only, if the master should die or cease to practise, and *some time* elapse before a new master has been legally constituted; or if the clerk should on a quarrel, or otherwise indiscreetly leave his first master, even for a *few days*, without having been previously assigned, *some loss* of time in either of these events would necessarily take place, and during which there would be no *legal service*; and consequently the trouble and expense of *new* articles must be incurred; (*l*) so that clearly it is most prudent, in the *first* instance, to let the binding be for a term of *six* years, determinable as above suggested, by which an occasional short absence would not prejudice. These cases, however, together with others, appear to establish, that though there must be a service *altogether* of *five years*, yet, provided the full number of days of service *under articles* have taken place, though at *different* intervals, that will suffice, and that the service need not absolutely be *continuous*. (*m*)

By the terms of the act it will be observed, that the service must be to “an attorney or solicitor *duty and legally* sworn and admitted in a Court of Record, &c.,” and he must be *bouâ fide* a *continuing practising* attorney or solicitor, and not have left off practice, (*n*) and he must be practising as a principal on his own account, and not serving as a writer or clerk to another attorney, (*o*) though it is expressly provided that the neglect of the master to obtain his *certificate* shall not invalidate the service of his articked clerk. (*p*) A binding to the Prothonotary or Secondary of the Superior Courts, or to the Master of the Crown Office (*q*) will suffice; the instruction and knowledge to be obtained in their offices being considered

(*k*) 55 Geo. 3. c. 184. Schedule i. tit. Articles.

(*l*) *Ex parte Rowle*, 2 Chitty's Rep. 61.

(*m*) *Carter's case*, 2 Bla. R. 957. *In the matter of William Smith*, 1 Dowl.

& R. 14. Chitty's Col. Stat. p. 66, note (*o*).

(*n*) 22 Geo. 2. c. 46, s. 7.

(*o*) Rule Trin. T. 31. Geo. 3. c. 2.

(*p*) 1 W. 4. c. 26, s. 6.

(*q*) 2 Geo. 2. c. 23, s. 16.

CHAP. I.
OF ATTORNIES
AND
SOLICITORS.

adequate tuition for an attorney ; (r) and since the 23 Geo. 2, c. 26. s. 15, a person who has served as an articled clerk to a *solicitor*, and been admitted to practise as a solicitor, is entitled to be examined and admitted, if competent, to practise as an *attorney*, and *vice versa* ; so that now, in effect, a binding and service to a *solicitor* entitles a person to be admitted as an *attorney* upon his establishing, to a judge of the Common Law Court, his competency to conduct that department of business, and *vice versa*. (s)

Exceptions also have been introduced by recent enactments with respect to the duration of the *time of binding* and service, in favor of persons who have evinced, that they have, at least probably, received a liberal education. Thus, the 1 & 2 Geo. 4, c. 48. s. 1, and 3 Geo. 4, c. 16, enact, that if the proposed clerk have taken the degree of Bachelor of Arts or Law, in the Universities of Oxford, or Cambridge, or Dublin, within the next immediately preceding four years, then it shall suffice if he be articled to serve as clerk to an attorney or solicitor for *three* years instead of *five* ; provided also such degree of Bachelor of Arts had been taken within six years, or such degree of Bachelor of Law had been taken within eight years after matriculation. These exceptions were, however, only introduced in favour of superior education at one of *the Universities*, and that also within a *recent* period, which it was considered would adequately supply the place of two out of the five years actual service under articles. The 1 & 2 Geo. 4, s. 2, only contains an exception which rather affects the time and mode of *service*, than the time of *binding*, for it provides that if a clerk has been articled for five years he may *serve part* of the time, not exceeding one year, as pupil to a practising barrister or certificated special pleader. (t)

It further seems, that the person to be articled to an attorney for the purpose of admission must be *bond fide* articled *as a clerk to learn the profession of the law* ; and therefore, where an attorney took a turnkey of the King's Bench prison as an articled clerk, evidently for the purpose of securing the business of the prisoners, the Court ordered the articles to be cancelled. (u)

(r) 49 Geo. 3. c. 28.

(s) 23 Geo. 2. c. 26. s. 15. Tidd. Prac. 9th ed. 72, 3.

(t) The act is silent, and therefore extends to a practising *barrister* in any department in common law, equity, criminal bar or conveyancing. The act

does not provide for clerks who serve a year or less with a *certificated conveyancer*.

(u) *Fraser's case*, 1 Burr. 291 ; and see *Ex parte Hill*, 2 Bla. R. 391. *Re Taylor*, 5 Bar. and Ald. 538.

With respect to the *terms* and *covenants* in the articles, the statutes are silent except in the requisites of the service in the professional department during the term of five years. Considering the importance of the contract, as intended to secure proper professional education during so long a term, and to enable a youth afterwards to practise for himself with advantage, articles of clerkship are generally very improvidently framed, without adequate covenants on the part of the master, or any proper stipulations providing for return of premium on the event of death, or other determination of the service before the end of the term. There are many events that ought to be more cautiously provided for. It has lately been considered by high legal authority, that there can be no objection in law to a stipulation to pay a reasonable salary to the clerk, although during the term of his articles, or a covenant that at the end of the term, if he have duly served, he shall be taken into partnership; and, perhaps, the master might, in consideration of the binding, and even without a premium, legally covenant to pay the widow or family of a deceased attorney a fixed annuity in consideration of the connection of the deceased father which he has or will acquire. (v)

CHAP. I.
OF ATTORNIES
AND
SOLICITORS.

Terms of the
articles, and
suggestions for
improvement.

The principal attorney may reasonably require the clerk and a responsible person, by the articles, to covenant for his due services, to stipulate that at the expiration of the term he will not set up in the same profession within a reasonable limited distance (perhaps even 50 miles, (w) nor accept or conduct business from any person, who has at any time during his clerkship, been a client of his master's; and it would be reasonable and proper, if not necessary, very particularly to stipulate, that at no time, either during or after the expiration of the term, shall the clerk, either directly or indirectly, be concerned for any person in any business or transaction adverse to the interest of any person who shall have been a client of his master at any time during his clerkship, nor at any time communicate, or in any way directly or indirectly use or take advantage of any knowledge of facts acquired in the office of his master, or in consequence of his having been in his office, so as directly or otherwise to prejudice or injure his master or any or either of his clients; nor cause, or enable, or suffer, or permit any other person so to do. A stipulation of this nature,

(v) Such a stipulation could not be a violation of 2 Geo. 2. c. 23, s. 17. 22 Geo. 2. c. 46, s. 11.

(w) *Barn v. Guy*, 4 East's Rep. 190.

See cases as to restraint of trade, &c. referred to in *Hemlock v. Blacklove*, 2 Saund. Rep. 156, note 1; and *Young v. Timmins*, 1 Tyr. R. Excheq. 226.

CHAP. I.
OF ATTORNIES
AND
SOLICITORS.

for reasons before suggested, is highly essential for the protection of the clients of the master, who have by the dishonourable conduct of articted clerks sometimes been most seriously injured. (x) The observance of such stipulations should, as far as practicable, be secured by every possible provision as to the payment of fixed damages as a *debt*, and not as a penalty, for otherwise it will frequently occur that juries will give mere nominal damages, although the proof has established a most injurious violation of the engagement. (y)

In case the articles should contain no stipulation for a return of premium in certain events, the Court of K. B. appears to exercise a summary jurisdiction so as to compel an equitable apportionment without resorting to a Court of Equity. (z) But it would save much trouble and expence to provide expressly for all events, and prescribe a gradation or scale of the parts of the premium to be returned in each case.

Points to be
observed before
and after execution of the
articles.

The age of the clerk and circumstances to be attended to at the time of his binding, and his previous education, will be presently considered, together with some suggestions upon his course of study. Care is to be observed that the articles be duly stamped before they have been engrossed, and consequently before they are executed, and that an affidavit of the due execution of the articles and date be filed within three months after such date, and that such articles be enrolled within six months after execution, pursuant to several statutes; for, though annual indemnity acts are usually passed, (a) the probability of that protection should not be depended upon. Besides, the omission might be urged by ill-natured individuals as a supposed defect in authority to practise, which might for a time, at least, be prejudicial when commencing practice.

What Service
under the articles,
and what affidavit of such
service are essential.

The same statute that requires a binding for the term of five years, also renders it essential "that such person, for and during the said term of five years, shall have *continued* in such service;" (b) and the subsequent statute 22 Geo. 2, c. 46, s. 8, still more expressly requires that the clerk "shall, during the *whole term and time of service, to be specified in such contract*, continue and be *actually* employed by such attorney or solicitor, or his or their agents, in the *proper* business, practice or employment of an attorney or solicitor."

(x) *Ante*, Part 2, page 436, note (a); *id.* 706, note (g), where see the necessity for such a stipulation; and see *post*.

(y) See *ante*, 872, as to the construction of agreements to pay stipulated damages, and their not being enforceable unless where the most cautious terms

have been used.

(z) *Anonymous*, see 2 Barnard, 227; *id.* 331. *Ex parte Prankerd*, 3 Bar. & Ald. 257; 1 Chit. Rep. 694. S. C. *Ex parte Bayley*, 9 Bar. and Cres. 601.

(a) See the last, 3 W. 4, chap. 7.

(b) 2 Geo. 2. c. 23, sect. 5 & 7.

The 9th section provides for the death of the master or his leaving off practice before the end of the term, and also for cancelling the contract by mutual consent; and for the clerks being legally discharged by rule of court, before the end of the term. And in either of these cases it is provided that another contract, on wishing to serve for the *residue* of the term, may be made, and that service under such fresh articles shall suffice. The 34 Geo. 3, c. 14, s. 8, more extensively provides for the determination of the articles by *any other event*.

The 22 Geo. 2, c. 46, s. 10, moreover requires, before admission, an *affidavit* of the clerk or his master, to be made and filed, that he had actually and really served and been employed by such practising attorney or solicitor to whom he was bound, or his agent, during the said *whole* term of five years, according to the true intent of that act, *viz.* in the *proper* business, practice, or employment of an attorney or solicitor.

Considering the former act of the 2 Geo. 2, c. 23, s. 5 & 7, and the above express clauses in the 23 Geo. 2, c. 46, s. 9 & 10, as to the requisite service and affidavit of service, it is clear that the legislature intended to require a *bonâ fide exclusive continuing service* to the master named in the articles, and *no other*, so that at least there should be no conflicting duties or incompatible occupations, and that the clerk should at all reasonable times be under the *immediate* controul of the master, in pursuance of and according to the terms of the articles; and accordingly it has been decided, that the statute is not complied with by the clerk's serving part of his time with *another* attorney, not his agent, though with his master's consent; (c) and the whole time must be at the disposal of the master, and no part of it otherwise *officially* employed; and it has been even held, that if a clerk should have obtained his admission, not having so served, he may be struck off the roll; as where the clerk had been during the term of service under his articles occupied as a surveyor of taxes, although such his employment did not occupy an eighth part of his time. (d) And upon the same principle, the Notary's Act, 41 Geo. 3, c. 79, which required continued and actual employment of the clerk articulated for seven years, was holden not to have been complied with by his attending as a banker's clerk daily till five o'clock, and after that hour going to his master, the notary, and presenting bills of exchange and preparing protests. (e)

(c) *Ex parte Hill*, 7 Term Rep. 456.
(d) *Re Taylor*, 5 B. & Ald. 538. *In re Taylor*, 4 Bar. & Cres., 341; 6 Dowl. & Ry. 428. S. C. *Res v. Scriveners Com-*

pany, 10 B. & Cres. 511. *Ex parte Hill*, 2 Bla. Rep. 991.

(e) *The King v. The Scriveners Company*, 10 Bar. & Cres. 511.

CHAP. I.
OF ATTORNIES
AND
SOLICITORS.

But a clerk articed to one attorney, partner in a firm, may comply with the statutes by serving all in their joint business; (f) and assisting another attorney at *extra hours* was considered as not breaking in upon a legal continuing service. (g) And it may be presumed that a clerk's receiving, with the concurrence of his master at least, during *extra hours*, instructions in sciences or languages calculated to extend his education, would not be held a violation of the intention of the legislature. So occasional recreation or short reasonable holidays, with leave of the master, especially in case of ill health, would probably not be considered as breaking the continuity of the service. In a late case, where an articed clerk who had served under the articles two years and a half, when he was prevented by *illness* from giving *regular* attention to business during the rest of the term, but attended as his health permitted, the Court admitted him on the ground that his strict regular service had been prevented by the act of God, and that the applicant had done all in his power to qualify himself. (h)

The expression in 22 Geo. 2, c. 46, s. 8, appearing to admit a service to the *agent* of the master to whom the clerk was articed as sufficient, was afterwards limited to *one year's service to such agent*, by a rule of court. (i)

It has been suggested, that if there has been a *bonâ fide* service, the Court will not be astute in construing the act; (j) and as an instance, the Court admitted a clerk to practise as an attorney where he had, with the consent of his master, served portions of his time to an agent, and although within two months of the expiration of the five years, he was absent from his duties, but *with the consent of his master* and the agent with whom he was engaged, but after the period of the five years he served out the two months. (k)

Of the *Examination* of the clerk before admission.

Before an articed clerk can be admitted, the statute 2 Geo. 2, c. 23, s. 2, directs, "That the judges of the Court or any " one or more of them shall, before they admit the person to " take the requisite oath, *examine* and enquire by such ways " and means as they shall think proper, touching his *fitness* " *and capacity* to act as an *attorney*; and if the judge or " judges shall be thereby satisfied, that such person is *duly* " *qualified* to be admitted to act as an attorney, then *and not*

(f) *Bhent's case*, 2 Bla. Rep. 764.

(g) *Id. ibid.*

(h) *Ex parte Matthews*, 1 Barn. & Adol. 160. *Ex parte Rowle*, 2 Chit. Rep. 61.

(i) Rule Trin. T. 31 Geo. 3. 4 Term

Rep. 379.

(j) *Fletcher's case*, 2 Bla. R. 734.

(k) *Ex parte Hubbard*, 1 Dowl. Prac. Rep. C. 438.

" *otherwise*, the said judge or judges are to administer the oath " to him, and afterwards to cause him to be *admitted*, and his " name to be *enrolled* as an attorney." And the 6th section contains a like direction as to the examination and admission of *solicitors*. If there should be any difficulty in obtaining the admission, then if the clerk think he can surmount it, the course is to proceed by *petition* to the court, supported by full affidavits removing the difficulty; and the decision of the court upon which will be final; because the jurisdiction is discretionary, and there is no court of appeal or higher tribunal, unless indeed by petition to the House of Commons. (*l*)

In general, an attorney who has been admitted in one of the Superior Courts, has a right to be admitted to practise in *any Inferior Court*; but this is subject to the custom or practice of that Court, and if by established local law, there is only to be a *limited* number of attornies, and there be no vacancy, that is an answer to a mandamus from the Court of K. B. to examine the applicant previous to his application for admission to practise in such Inferior Court. (*m*)

Perhaps, considering the great influence that attornies and solicitors have over the property and peaceable intercourse of society, and the impropriety of admitting ignorant or otherwise improper persons to practise, it would be well if the superior judges were relieved of the trouble of examining clerks as to their fitness to be admitted, which, from the multiplicity of their other functions, they cannot perhaps exercise with sufficient scrutiny, and if the office were transferred to other delegated officers, with power of *appeal* to the judges, either for or against an admission. At present, compared with the examination instituted before admission to practise in the medical and some other occupations, the admission of attornies is much more facile as regards their legal as well as their moral attainments, than that of admission to medical practice.

With respect to the *preparatory education* of a youth intended for any department of the law, especially as an attorney or solicitor, it should be much more extended than has hitherto been customary. Parents would do well not to article their sons before they have completed their *sixteenth* year, and have finished with care and assiduity, at least a *good classical* school

Of the *Education* of articled clerks previous to, and pending their service.

(*l*) 2 Geo. 2. c. 23, s. 2 to 6; 23 Geo. 2, c. 26, s. 15; 1 Geo. 4. c. 55, s. 4; and see the principle, *Rex v. Gray's Inn*, Dougl. 353; *Wooler's case*, 4 Bar. &

Cres. 855.

(*m*) *Rex v. Sheriffs of York*, 3 B. & Adolp. 770.

CHAP. I.
OF ATTORNIES
AND
SOLICITORS.

education, and even that alone will scarcely be sufficient to enable a party afterwards to proceed through life with full advantage, much less to obtain great eminence. Even after the completion of a good school education, two or three years of study, under proper direction, of most of the useful sciences before he is to be articulated, would be highly advantageous. It should be remembered, that to proceed with facility through any professional pursuit, an attorney should at least be *well* informed of the dead languages, the Greek and Latin, from which so many scientific terms are derived, not indeed in *law*, but in other branches of knowledge and literature ; for they may have to conduct suits and proceedings connected with *every science*, and therefore some previous knowledge of each would be desirable, and especially a full knowledge of physics or natural philosophy. All branches of society have, particularly of late, so much advanced in knowledge, that unless a professional gentleman be well acquainted with an outline of most sciences, he will when he starts in business, find himself too cramped in knowledge to act with safety, or without apparent embarrassment, from fear of exposure or error. A knowledge therefore of the outline of all that will probably be practically useful, should be acquired before the commencement of his *legal* pupillage ; and then about the age of sixteen (or even later if he be not previously fully prepared in these respects, and if the expence and seeming delay of a few years study at the University of Oxford or Cambridge cannot be afforded,) let him be articulated for *six* years, (which by strict attention he may as above suggested shorten to five,) and then soon after the age of twenty-one, he would be ready to start for himself, or at least be able to accept for a time the management of an office as principal clerk, until by established character for professional skill, and by increasing age, he will have justly acquired the confidence of his relations and friends. Moreover, let him be articulated to a gentleman himself of liberal education, and who will be anxious that his pupil shall blend an increasing knowledge of useful sciences with legal pursuits, so as to *permit*, if not *supply him* with assistance upon the former ; and he might even find it useful in practice to be acquainted with the art of drawing, at least so as to be able without expence to his client, to describe on paper, machinery, local situations, and other matters in aid of a cause. (n)

(n) As regards *practically useful sciences*, if they have not been acquired *before*, it is recommended that the study of the subjects discussed in Dr. Arnott's

Elements of Physics and Natural History be pursued, and that courses of Lectures at the King's College or the London University be attended, with leave of the

By this means, much of the five years, otherwise irksomely long, may be profitably and cheerfully occupied in mental and technical improvements; and finally, having acquired enlarged and well cultivated understanding, he will be enabled to practise with honour and profit to himself and advantage to the community.

As regards his intermediate study, as well of practically useful sciences as of law, the student may borrow from the few hints presently offered to the student for the bar.

It should be further observed, that besides due knowledge of law and useful sciences, it will be of great importance that the youthful attorney should, as he progresses, study the distinguishing *temperaments* and *characters* of mankind, to which also the reading of biographical works would greatly contribute. He has to contend with the passions, the weaknesses of human nature, and not unfrequently, even against the cunning and iniquity of mankind; and consequently an attorney or solicitor who is a mere lawyer will scarcely ever attain eminence. This important truth will be particularly exemplified in the chapter relating to preparing a cause for trial or hearing, when the skill of an attorney may be particularly exemplified by his power of discrimination, and of justly anticipating the probable effect of the testimony of each witness. The study of *Man* should, therefore, be constantly in view, lest the practitioner be circumvented or incautiously mixed up with or contaminated by the bad propensities of his client.

The foregoing rules and observations, as to the legal competency of a party to practise as an attorney or solicitor, apply rather to the party so acting than to his *client*; for although the incompetency to act on account of the want of regular admission or annual certificate, subjects the assumed attorney or solicitor to penalties of 50*l.*, (o) and precludes him from suing excepting merely for giving advice, (p) yet the client

How far the want of legal qualifications in an attorney may or not affect the client.

master, and at hours not incompatible with the duty of a clerk. As a simple instance of the utility of the knowledge of physics, or the laws of nature and mathematics, or rather of the consequences of ignorance, may be stated the result of an action where a young man had furiously driven his father's phaeton against a heavy coach on the road, and then pretended that *he* had driven moderately and the *coachman* furiously, and thereby induced his father to prosecute the coachman; and upon the trial the ignorant youth and his servant, and his equally ignorant attorney, assured themselves of success by zealously proving, perhaps beyond the truth,

that the *shock of the coach was so great as to throw them down over their own horses' heads*; thereby necessarily proving that the faulty velocity was *their own* and not that of the coachman, because upon established principles such event could only be attributed to *excessive velocity in driving the phaeton*. Innumerable similar cases might be here instanced of the practical utility of knowledge and the application of it to even the most common subjects, but of which the bulk of society are still ignorant. 1 Arnott, El. Phy. 54.

(o) 2 Geo. 2. c. 23, s. 24; and 22 Geo. 2, c. 42, s. 12.

(p) *Smith v. Taylor*, 7 Bing. 260.

CHAP. I.
OF ATTORNIES
AND
SOLICITORS.

is not to suffer, at least, for the want of the certificate, and the proceedings on his behalf are sufficient and valid; (q) nor does the incompetency of the party acting as attorney deprive his client, when a plaintiff, of his right to full costs against the defendant. (r) But under the particular rule requiring the presence of an attorney when a warrant of attorney is executed by a defendant in custody under mesne process, it has been decided, that the presence of an uncertified attorney is not sufficient; (r) and in the first mentioned cases, if the client knew that the party employed was incompetent to act, probably a different rule would prevail, and the validity of his proceedings might be impeached. And in a modern case, where process was sued out in the name of A. by B., neither of whom were attorneys of that Court, and had no authority of any other attorney to act in his name, the Court set aside the proceedings, and ordered A. and B. to pay the costs. (s) Upon the whole, therefore, it is most prudent for a party to ascertain that a person whom he is about to employ is an attorney of the proper Court, and is fully authorized to act therein, for otherwise, at least, he may sustain the delay and inconvenience that would result from some motion and rule upon the supposed defect.

Rules for a
client's selec-
tion of an at-
torney or soli-
citor, proctor,
&c.

With respect to the *selection* of an attorney or solicitor, some hints have already been given. (t) The following observations are not addressed, nor can be intended to apply to members of the profession who have been long established in practice, and are known to observe the true interests of their clients, as zealously as they despise low artifices to increase business, instead of counteracting the too frequent litigious dispositions of irascible clients. But a few observations upon the proper conduct of professional men, as *prescribed by different Judges*, may be useful to *students*, and those who are as yet *young* in practice. Many points of professional duty have already been suggested in detached parts of the work. We will collect a few other leading points, as well for the use of clients as for the profession.

A cautious party anticipating litigation, would naturally prefer an *experienced* solicitor, whose character has already been established; but these are frequently so previously engaged, as to be unable to undertake the business; or relationship or

(q) *Welch v. Pribble*, 1 Dowl. & R. 215; *Reader v. Bloom*, 10 Moore, 261; 3 Bing. 9. S. C. *Anon*, 2 Chitty's Rep. 98.

(r) *Vesye v. Dodd*, Tidd. *sup.* 57.
(s) *Hawkins v. Edwards*, 4 Moore's Rep. 603.
(t) *Ante*, Second Part, 435, 6.

kind feeling may induce to the encouragement of a young practitioner, and whose zeal, constant attention, and activity, will frequently make up for the want of experience. Here the principal *desideratum* should be the *honourable* character and disposition of the practitioner; for many a good cause has been lost by the prejudice excited in the mind of a judge or jury, merely by the circumstance of the same being conducted by an attorney, known to have previously blundered, or been guilty of unprofessional or dishonourable conduct. When a cause is conducted by such a professional agent, it will frequently be even anticipated, that the witnesses have been tampered with; and the counsel themselves, knowing the general character of the attorney, will suspect the truth or correctness of his client's case; whereas, when he has received his brief from an attorney of known care and probity, he can venture fearlessly and boldly to examine and cross-examine witnesses according to his instructions, and need not anticipate either blunder or fallacy.

No prudent purchaser should employ on his own behalf an attorney or solicitor, who is also concerned for the vendor of the estate, or for the proposed grantor of an annuity; not only because a person so charged with conflicting duties, may not be so apt or prone as he should be, to discover flaws in the title of the vendor or grantor; but also, because in other respects the knowledge acquired by such a double agent, might prejudice the purchaser. (u) Indeed the discordant duties may become so conflicting, as to render it impracticable for an honourable solicitor to proceed on behalf of both employers.

Purchaser not to employ vendor's attorney.

It has been not unusual for professional gentlemen to be constituted trustees, by which they obtain such a controul over property, that difficulties may arise in subsequent family arrangements, and it may become necessary to institute a suit which otherwise might have been avoided. It has recently been settled, upon great consideration, that a trustee, whether he be or not an attorney, cannot act professionally, so as directly or indirectly to charge for his personal trouble, or for professional business connected with his trust, either in his office or for his benefit; hence it should seem that unless this rule of law be evaded, it is against the interest of any attorney, as it usually is of his client, that he should be appointed a trustee. (v)

A cestui que trust should not employ a trustee who is also an attorney, nor should he act as such.

(u) See 6 Vesey Rep. 631, note; *Bowles v. Stewart*, 1 Schol. & Lefr. 227; and illustrations, Sugd. Ven. & P. 8th ed. 8, 9. When a purchaser employs the vendor's attorney, he may be affected by the knowledge of, or notice to such attorney, of a defect in the title, or of prior incumbrances; *id. ibid.*; and see

Franklin v. Colhoun, 3 Swanst. 301.

(v) *Turner v. Hill*, and per Lord Lyndhurst, in *New v. Jones*, 8 Aug. 1833; first reported in *Legal Observer*, Vol. vi. p. 410; *Baker v. Grosvenor*, MS.; and *Carmichael v. Willson*, 4 Bligh, 145, *contra*.

CHAP. XI.
RETAINER
OF A LEGAL
AGENT.

A solicitor should not be concerned against a person who has once been his client, in any transaction in which he might avail himself of previous confidential communication.

Nor should a solicitor undertake any suit or business, in transacting which he might and probably would, be able to take advantage of a knowledge of facts previously communicated to him confidentially or incidentally, from other business transacted for another client, and injuriously to the latter; and indeed, if he do, we have seen that in general a Court of Equity would restrain him from so doing: (w) and it is a general rule in equity, that an attorney or solicitor cannot give up his client, and act for the opposite party in any suits between them; (x) and he may by anticipation, upon sufficient grounds of apprehension, be restrained from communicating his client's secrets, or any communication of facts made to him professionally; (y) and solicitors in partnership cannot dissolve their partnership, as against their client, without his consent, at least so as to enable the retiring partner when discharged to act against him; (z) and the practice of one solicitor and clerk in court to be concerned for all parties, though admitted, was disapproved by the late Lord Chancellor. (a) And the same objection would probably be applied to a London agent acting in that character for the country attorney, as well of the plaintiff as the defendant, though when he merely transacts the *formal* steps in the cause, no inconvenience can probably result.

But where a clerk to a solicitor had commenced practice for himself, a Court of Equity refused to restrain him from acting as solicitor for parties against whom his master was employed, upon a mere *general* allegation of his having in his former service acquired information likely to be prejudicial to the clients of his master. (b) Hence the great risk of leaving title deeds, abstracts, or any secret information exposed in the office of a solicitor accessible to his clerks, (c) and the expediency of stipulating, in articles of clerkship, against the possibility of the clerk acting injuriously to the interests of clients, and for clients themselves stipulating in certain cases for a guarantee from their attorney or solicitor against such consequences. (d)

Propriety of requiring a written retainer to sue or defend.

There can be no doubt, from reading some ancient statutes,

(w) *Robinson v. Mullett*, 4 Price's Rep. 353; *Cholmondeley v. Clinton*, 19 Ves. 261; and see *ante*, 705, 6; and read the cases of *Beer v. Ward*, 1 Jacob R. 77; *Escott v. Price*, 1 Simon's R. 483; *Newberry v. James*, 2 Meriv. 446; and see Chitty Eq. Dig. tit. Professional Confidence, p. 1183; *id.* tit. Solicitor and Client, p. 1238. The student could examine all the cases under the latter title.

(x) *Cholmondeley v. Clinton*, 19 Ves. 261.

(y) *Id. ibid.* 261; *Beer v. Ward*, 1 Jac. 77; *Morgan v. Shaw*, 4 Madd. Rep. 57.

(z) *Cholmondeley v. Clinton*, 19 Ves. 273.

(a) *Id. ibid.*

(b) *Bricheno v. Thorp*, 1 Jacob R. 300, *ante*, 706.

(c) *Ante*, 486, note (a), and the *Newcastle case*, 8 Ves. 141; and Sugd. V. & P. 8th ed. 306.

(d) *Ante*, 9, 10.

that the Legislature considered it essential that an attorney should actually file his written warrant or authority to sue; and although it has ceased to be the practice of late to take any *written* authority from the client, whether plaintiff or defendant, as well at law (d) as in equity, (e) such omission has been censured; and if the authority to sue or defend or take the proceeding should be disputed, the inability to produce a written authority would create a prejudice against the attorney. Lord Tenterden, C. J., said (f) "I think it right to state that *every respectable attorney ought, before he brings an action, to take a written direction from his client for commencing it; and he ought to do this as well for his own sake as for the sake of his client. It is much better for him, because it gets rid of all difficulty about proving his retainer; and it would also be better for a great many clients, as it would put them on their guard, and prevent them from being drawn into law suits without their own express direction.*" It would be well if these salutary observations were enforced by modern positive enactment; for unquestionably numerous instances daily occur of a client having merely intended at most to authorize an attorney to write letters for debts, when perhaps in a few weeks afterwards he finds to his surprise that his communication has been stretched into an authority to prosecute actions which are then even ripe for trial, against parties who turn out to have become insolvent, and then some clerk or clerks will swear to frequent calls in his principal's office, or even to an *express* verbal authority to sue. Unless the attorney or solicitor for a *claimant* stands above suspicion, he should have a *written* authority, qualified according to the deliberate intention of the party, as "to demand payment of the debt," "to take an opinion," "to issue a writ and declare only," particularly guarding against any unlimited authority without further communication. So on behalf of a *defendant*, the retainer should be in writing, as "to tender £——," "to put in and justify bail," "to pay £—— into court," "to defend until notice of trial, but no further without fresh instructions." By this means a party might protect himself from being plunged precipitately, or carried on through all difficulties into

(d) *Owen v. Ord*, 3 Car. & P. 349; *Gill v. Lougher*, 1 Tyrw. 121; *Anderson v. Watson*, 3 Car. & P. 214; *Dupin v. Keeley*, 4 Car. & P. 102; and Newl. Ch. Pr. 59.

(e) See *Cases Chit. Eq. Dig., Solicitor and Client*; and *Wright v. Castle*, 3 Mer. 12, that a *special* authority to sue is essential, though not to *defend*.

(f) See *Owen v. Ord*, 3 Car. & P. 349.

CHAP. XI.
RETAINER
OF A LEGAL
AGENT.

expensive litigation. (g) When an attorney or solicitor is retained by assignees of a bankrupt or insolvent or trustees, it is then still more essential to obtain the signatures of all his employers; and if the authority is to be from assignees of a bankrupt to institute a suit in equity or to compound or submit disputes to arbitration, it is the duty of their solicitor first to convene a meeting of the creditors, and obtain the consent of the major part in value, as directed by the Bankrupt Act; (h) and the Insolvent Act implies the same proceeding. (i)

Stipulation that due care has been observed in ascertaining a title.

Supposing an attorney to have accepted a retainer and to have conducted an intended purchase up to the instant before payment of the purchase money, it would be expedient for the client to obtain from his attorney, even upon payment of a small sum, a formal written guarantee that he has used due care in investigating the title, with an engagement duly framed, that if it should turn out otherwise, he will make satisfaction upon the discovery of the defect; by which means the too frequent loss of remedy against the attorney by the bar of the statute of limitations would be avoided, as the statute would then not run against the engagement until the discovery. (k)

Attorney or solicitor not to disclose his client's communications.

Another suggestion may be important, as sometimes essential to justice, viz. that an attorney or solicitor cannot be *compelled*, nor indeed is *at liberty* to communicate any deeds or facts, the existence of which were merely told to him professionally by

(g) The following forms of retainer may be readily varied according to each particular case.

Form of a warrant or retainer by a claimant or plaintiff, of an attorney to sue.

I, *A. B.* of, &c. do hereby retain Mr. *C. F.* of, &c. as my attorney, to [commence and prosecute an action in the Court of —, against —, of, &c. for the recovery of the sum of £. 100. and upwards, which I claim to be due from him to me, as appears per annexed [or “subscribed particulars.”] Dated this — day of —, A. D. —.

Signed by the said *A. B.* in my presence, after he had read the same the day above mentioned. } *L. M.* Witness

A. B. (L. S.)

In the Court of K. B.
[C. P. or Exchequer.]

Between { *A. B.*, Plaintiff,
and
C. D., Defendant.

Form of a retainer to be signed by a defendant in an action.

I, *C. D.* of, &c. the above named defendant, do hereby retain and employ Mr. —, of, &c. as my attorney, to [defend the above action commenced against me by *A. B.*] Dated this — day of —, A. D. 1834.

Witness to the signature of the said *C. D.*, after his having read the same in my presence the day aforesaid. } *N. O.* Witness.

C. D.

(h) 6 Geo. 4, c. 16, s. 88; 2 Young & Jerv. 475; 3 Young & Jerv. 373.

(i) 7 Geo. 4, c. 57, s. 24; 3 Bing. 203, 370; 10 Moore, 7; and Chitty's Col. Stat. 596, note (e).

(k) *Short v. M'Carthy*, 3 Bar. & Ald. 626; *Brown v. Howard*, 2 Brod. & Bing. 73; *Howell v. Young*, 5 Bar. & Cres. 259.

his client, (l) though as to *acts* done in his presence, as the execution of deeds, &c., there is no such privilege; (m) and therefore when it is important for any just purpose to execute a deed or other transaction, and yet to conceal the same, it should be effected in the absence of the solicitor, though his client might afterwards confidentially inform him of the fact. In one case, Lord Tenterden held that such privileged professional confidence is to be confined only to communications relating to some *action* or *suit*. (n) But other preferable decisions establish that the rule is not thus limited, but extends to all questions put by a client, as relating to the probable effects of a fraudulent deed, and to all his communications connected with or having reference to his professional character; so that now a client may safely communicate every fact, and hold every description of conversation with his attorney or solicitor, or even the clerks of either, and they will not be allowed to divulge the same. (o) But where two persons in dispute employ the same attorney, the communication made by either of them may be used by the other, if at the time such communication was made it was intended by the party making it to be communicated to the other party. (p)

It is scarcely necessary to observe, that every prudent attorney or solicitor, except in the clearest cases, where the precise evidence has been previously ascertained, should before he *commences* or *defends* any proceeding, be well assured that *sufficient evidence can be adduced*; and if his client be either too sanguine or hasty, it will be advisable to incur the expence in the first instance of examining at least one or two of the principal witnesses, and that *in the absence of the client*, who is too apt to suggest facts to the witnesses, and who may too readily assent and thereby mislead. By this precaution a double advantage may be acquired, that of not only obtaining an accurate view of the facts, but also of eliciting evidence before the opponent and his witnesses have become cautious and guarded. (q) Lord Tenterden, we have seen, observed "that an attorney who allows his client to proceed without pointing out to him the expediency of ascertaining the evidence, and that in the very *first instance*, and well considering the probable result,

Duty of attorney, solicitor, or proctor, to ascertain the facts and the proof thereof, and law, before commencing or defending any proceedings.

(l) *Stratford v. Hogan*, 2 Ball. & B. 164. In one instance, however, a solicitor was ordered to be examined against his client in a case of fraud; *Couts v. Pickering*, 3 C. R. 66.

(m) *Sanford v. Remington*, 2 Ves. J. 189.

(n) *Williams v. Mudie*, 1 Car. & P. 158; *Broad v. Mead*, 3 Car. & P. 518.

(o) *Cromack v. Heathcote*, 2 Brod. & Bing. 4; *Doe v. Harris*, 5 Car. & P. 592.

(p) *Baugh v. Cradocke*, 1 Mood. & Rob. 183; and *Cleve v. Powell*, 1 Mood. & R. 228.

(q) *Ante*, 440, 1, 510. As to the mode of examining witnesses for this purpose, see *post*, "Of preparing for Trial."

CHAP. XI.
RETAINER
OF A LEGAL
AGENT.

Duty to state
a case, and
how; and to
obtain what
opinion.

"is guilty of *grossly absurd and culpable negligence*." (r) We shall presently suggest *how* a case should be stated for the opinion of counsel, and how particular and precise an opinion should be required; by which means disastrous defeats would frequently be avoided. (s)

If the law applicable to the facts should be at all questionable in the judgment of the attorney, then he should suggest to his client the expediency of taking an opinion of counsel, and obtain his authority for that purpose; and which case, *when properly framed*, with an *explicit* opinion of an experienced counsel favourable to the subsequent proceeding, will in general afford protection to the *attorney* for any misapprehension on the advised right of the party; (t) and sometimes, probably in case of arrest which turns out ill-advised in point of law, by such opinion having been taken, a jury may be induced to moderate the damages, although the same would not, of itself, afford a legal bar to the action, because an *arrest* is not essential to the trial of a right. (u) But a case stated in a *hurried manner*, without a *full and accurate disclosure* of all the facts, and without being well assured by the attorney's own examination that there is *legal* evidence to prove the facts, or a case stated so generally, and without sufficient specific separate questions so as to draw the *attention of counsel* to the important points, and to answer each in particular, will form no such protection; but on the contrary, may induce suspicion that for the sake of having a suit or defence to conduct, the attorney has carelessly or even purposely neglected to raise the material points. And if in consulting a counsel upon an abstract, a solicitor should take upon himself to draw a conclusion from deeds, and do not lay the deeds and the whole of the facts before the counsel, and should err in such conclusion, a jury might find a verdict against him for his negligence (v). If the opinion of counsel should be doubtful or ambiguous, it would then be proper to state a *further case*, or to see the counsel in consultation, until such an *explicit*

(r) *Ante*, 1 Vol. 440, note (k); and certainly, when it is considered that by the very small expense of a fee to counsel in the *first instance*, for an opinion, a disastrous result at the *conclusion* of a cause occasioning very large expence, might be saved, the omission seems inexcusable.

(s) See *infra*, and *post*, 42, 3.

(t) *Kemp v. Burt and another*, 1 Neville & Manning's Rep. 263, *post*. 32, 42, 3.

(u) *Ravengar v. M'Intosh*, 2 Bar. & C. 693; 4 Dowl. & Ry. 187; S. C. *Briston v. Heywood*, 1 Stark. R. 44; *Godefroy v. Jay*, 1 Moore & P. 236; 6 Bing. 616.

(v) 3 B. & Cres. 799; 5 D. & R. 587, S. C. So if an attorney take too short an abstract of a will, and omit a material qualification of a bequest, and any consequent damage arise, he may be sued, 3 Stark. R. 154; 1 D. & R. 30, S. C.

answer in writing has been obtained to a written statement as will unquestionably sanction the attorney in his subsequent proceedings; and still if there should be any doubt upon the result, the client should in the presence of a respectable and disinterested third person, be requested deliberately to read the statement and opinion, and then in writing reciting that a case has been stated and opinion obtained, direct precisely what shall be done. This was stated to be the duty of an attorney by Lord Tenterden, and also accords with the opinion of one of the most eminent conveyancers and equity counsel of the present day, as regards the duty of an attorney, in taking an opinion upon a title or upon the expediency of a Chancery suit. An opinion of counsel upon an imperfectly stated case will very frequently mislead, although such opinion might be perfectly correct in itself.

As regards this part of the duty of professional men, the observations of Lord Stowell are strongly in point, especially when the suit or proceeding is on behalf of illiterate or ill informed persons. "The proctor has in these cases something of a public as well as a private duty thrown upon him, something that in such cases he owes to the fair administration of justice as well as to the private interests of his employers. The interests propounded for them ought in the proctor's own apprehension to be just, or at least fairly disputable; and when such interests are propounded, they are not to be pursued *per fas et nefas*." (v)

Another hint may be useful, as well to clients as to professional practitioners, namely, to have it understood and expressly stipulated, that *matters of importance*, and especially of *negociation*, where the skill and experience of a principal attorney may be most important for success, that such principal attorney should *himself* conduct the whole or a certain part of the proceeding, and not hand it over to a clerk or third person to transact, as is too frequently, and culpably the case, and by which an otherwise successful result may be marred. Indeed, without any such stipulation, it appears from the observations of Lord Stowell upon the duty of a proctor, to be the duty of the principal attorney or solicitor himself so to act; for his lordship said, "I adhere to the opinion I have expressed, that where an intercourse for such a purpose as the definitive settlement of a claim is to take place, it is most effectually conducted by the proctors *themselves*, and not by

When it is the duty of the principal attorney or solicitor *himself* to conduct the proceeding, and not to delegate to a clerk.

(v) *Case of the ship Frederick*, 1 Haggard's, R. 222.

CHAP. XI.
RETAINER
OF A LEGAL
AGENT.

Conduct of an
attorney, soli-
citor or proc-
tor, with re-
spect to nego-
ciations.

“ their clerks ; they have both a personal and legal weight, and
“ an authority that can better support them against over-
“ weening pretensions ; and there is a direct responsibility
“ belonging to them highly proper to intervene in any point so
“ extremely important as the proposed final adjustment of a
“ cause ;” and in that case he made the proctor pay all the
costs, in consequence of his neglect of duty in that and other
respects. (w)

In negotiations between solicitors of known integrity and
honour, there will be no danger from an interchange of candour
and liberality ; but, unhappily, there is too frequently great
risk of the want of reciprocity in candour ; and, consequently,
unless the honour of the opponent be well known, no communi-
cation of facts should be made that could be ungenerously taken
advantage of injuriously to the client, even though expressed to
be made without prejudice ; (x) but, on the other hand, we
have an excellent practical lesson from the same great judge,
Lord Stowell, upon ethics and moral conduct to be observed
by all practitioners, or they may themselves personally suffer
from a deviation ; namely, “ That not only is a practitioner
“ bound *not* to stifle evidence or to instruct witnesses when
“ examined not to commit themselves, or in other words not to
“ tell the whole truth. But, moreover, that where a meeting
“ is professedly held for amicable arrangement, and the parties
“ are personally produced for the purpose of fair agreement and
“ to prevent litigation, it is contrary to the purpose of such a
“ meeting to resist fair disclosure of all facts leading to a just
“ conclusion, or to suppress facts without a knowledge of which
“ real justice is unattainable ; for men ought not to come to
“ such a meeting as to a catching bargain, but in the full spirit
“ of equitable adjustment ;” and as the proctor in that case had
violated that rule of professional conduct, Lord Stowell decreed
that he should pay all the costs. (y)

Other duties ;
as his duty to

Another important duty of every solicitor as regards every

(w) *The Frederick*, 1 Haggard. Rep. 220.

(x) A communication “ *without pre-
judice*,” although not strictly admis-
sible in evidence, will nevertheless some-
times be taken advantage of, and indeed
sometimes justly so ; and therefore a
cautious solicitor should abstain from
communicating any important informa-
tion, even with that guard. It is well
known that a young attorney had to pay
heavy damages for the breach of pro-

mise of marriage, although all his love
letters and promises were, as he thought,
very cautiously concluded “ *This, with-
out prejudice*, from yours ever faith-
fully, C. D.” The judge, facetiously,
left it to the jury whether those con-
cluding words, being from an attorney,
did not mean that he did not intend any
prejudice to the lady, and the jury found
accordingly.

(y) *The Frederick*, 1 Haggard. Rep. 223, 4.

description of business is, that as soon as he has prevailed on another party to enter into any arrangement beneficial to his client, *he should instantly on the spot*, reduce into the form of a short but proper preliminary agreement, if he have not (as is advisable) already a proper form prepared, (z) and have it signed, least upon further consideration, the other party should, although dishonourably, attempt to fly from his engagement, and insist on terms more favourable to himself. (a)

CHAP. XI.
RETAINER
OF A LEGAL
AGENT.

secure a binding written engagement, or security for his client.

Amongst other devices to increase expences, and acquire additional profits by unjust means, no expedient has been more successful amongst a few disreputable individuals than splitting what might have been effected in one entire loan, into several transactions, and causing several mortgages or several grants of annuity with several deeds, to be executed. The numerous reported decisions under the Annuity Act, evince how often, in answer to an application for an advance of one, two, three, or more thousand pounds, the answer is, I have no one client who can advance that sum, but I have four or five who will advance about 1000*l.* each; but then he will have a separate security for himself; and accordingly the entire sum will be advanced on one, two, three, or more sets of deeds, with a repetition of charges for attendance, &c., as if the transactions had been entirely distinct; (b) and although in these cases sometimes the Court will set aside the warrant of attorney, especially where the grantee is contaminated in the transaction; yet, even then he may in general recover back the principal sum, and interest at the rate of 5*l.* per cent.; so that he sustains in effect no loss in consequence of his attempt to impose hard terms, excepting that he may have to pay the costs of the motion.

Impropriety of increasing expences by any means.

Perhaps next to the duty to take due care that the principal proceeding and the steps depending thereon shall be *accurately* taken, *Expedition* is of paramount importance. The legislature and the courts are constantly striving to perfect that object; but such endeavours are sometimes counteracted by attornies in low practice; so that under the pretence of courtesy to the opposite attorney or his client (but which ought never to be shewn to the injury of the employer), or on some

Duty to expedite.

(z) It would be found advantageous for solicitors to have ready prepared, with blanks for names, &c., every description of agreement relating to ordinary bargains, especially those relating to leases, and so full in the stipulations

as to require reduction rather than enlargement.

(a) *Ante*, 1st Part, 294, note (b), and 2nd Part, 472, 3.

(b) 1 Bing. 234; 8 Moore, 109; S. C. 4 Bing. 26.

CHAP. XI.
RETAINER
OF A LEGAL
AGENT.

other flimsy ground, some causes are not brought to a termination as soon as they ought; and the consequence is, not merely the increase of fees, for successive refreshers, term fees, &c., but it too frequently occurs, especially in Courts of Equity (where the parties are often numerous,) that pending the delay, by intervening marriages, births, deaths, bankruptcies, insolvencies, and different other events, it becomes necessary to revive the suit and introduce fresh parties, and so that not unfrequently a final decision is not obtained until the second or third generation after the death of the party who originated the suit. *That* solicitor, whose practice first puts his client in possession of the fruits of the proceeding, is obviously to be preferred, whilst the tardy solicitor is as injurious to his client, as to his profession, who are by the vulgar indiscriminately calumniated as well as the law itself, in consequence of such misconduct of a few inferior individuals. (b) Moreover, as soon as the proceeds have been recovered, the attorney should immediately hand over the amount to his client, or at least the balance, after deducting his own reasonable fees; a just proceeding, which will always insure the approbation and recommendation of the client.

Stipulations
for remunera-
tion out of the
usual course,
illegal.

In general respectable attornies or solicitors make no express stipulation with their clients relative to remuneration; and at most, when the client's circumstances and the result are doubtful, and the proceeding is expected to be expensive, he will require an advance to cover expenses, and which he is entitled to demand, (c) or the guarantee of a third person, which

(b) Too many instances of this culpable indolence, or, it is to be feared, want of principle, have occurred: one is well known and authenticated. An attorney, on the marriage of his son, gave him 500*l.*, and handed him over a chancery suit, with some common law actions. About two years after the son asked his father for more business. *Father*: Why I gave you that capital chancery suit and the actions, and I hear you have got a great many new clients; what more can you want? *Son*: Yes, father, but I have *wound up* the Chancery suit and given my client great satisfaction, and he is in possession of the estate. *Father*: What! you improvident fool! *that suit was in my family for twenty-five years*, and would have continued so as much longer if I had kept it; I shall not encourage such a fellow. *Sequel*: The father died a few years after, comparatively poor, having worn out nearly all his clients, and being despised by every one; the son honourably con-

ducted his practice for *fifteen years*, and has now retired, residing upon his purchased estate respected and esteemed by all. If a *physician* were detected in purposely prescribing injurious or *ineffective* medicine, in order to protract his patient's illness, and to obtain an accumulation of fees, what would be the deserved censure of mankind! and yet he might perhaps better excuse *himself* than the lawyer, on the ground that the illness was occasioned by the profligacy or intemperance of the patient, and that his suffering for a time might teach him future temperance, besides benefiting the profession.

(c) Per Bayley, J. in *Wadsworth v. Marshal*, Exch. 2d June. A.D. 1832, MSS. It was his opinion that an attorney was entitled to insist that he should be supplied with the money necessary to carry the cause to trial, not only to the amount out of pocket, but the other expenses. And see *Hoby v. Built*, 3 Bar. & Adol. 350; *Rowson v. Earl*, 1 Mood.

should be in writing, expressing the consideration, and properly framed. (d) But an attorney cannot legally take a prospective *mortgage* as a security for *future* costs. (e) In order to secure confidence and despatch, the client should spontaneously offer an advance of money, or such guarantee, when he apprehends that the attorney would prefer having the same. Any arrangement respecting the remuneration for trouble and expences, when there is mutual confidence, usually waits till the completion of the suit or other business, although the better opinion is, that an attorney may refuse to proceed without advance of cash, provided he give due notice of his requiring the same. (f) At all events, at the termination of the suit, the fees and costs should (unless to be paid by the opponent,) be promptly and readily paid by the employer, except there has been such gross negligence or misconduct, as to have been prejudicial to the full extent of the claimed costs, (g) or the charges be for unnecessary and useless business, (h) or excessive. In the latter case, if there be any *taxable* claims or charges for business done in a suit, the bill must be delivered a month before the commencement of any action to recover such fees, and pending that month, or at any time after, before the commencement of an action, the bill may be taxed; (i) or if not taxable, an adequate tender should be made.

Any stipulations by the attorney, that his remuneration shall depend on the event of the cause, would before the recent act have rendered him an incompetent witness in support of the proceeding. (k) And no attorney or solicitor can legally or effectually stipulate to have part of the estate or money to be recovered, in lieu of ordinary costs, as that would amount to the offence of *champerty*, and, perhaps, induce the Court to strike him off the rolls. (l) Nor is it legal for a plaintiff's attorney to

& Mal. 538, overruling Sayer 173, and other cases in Tidd's Practice, 9th edit. 86, 87. The cases in *Equity*, 14 Ves. 196, 271; 1 Swans. 1; 3 Swans. 93, seem to establish that a solicitor must proceed without funds; but *semble*, it would now be ruled otherwise.

(d) *Barker v. Fox*, 1 Stark. Rep. 276; *Hollings v. Gregory*, 1 Car. & P. 627.

(e) See several cases, Chit. Eq. Dig. tit. Solicitor and Client, IV; and even as to *antecedent* costs, a mortgage is not conclusive, nor prevents taxation. 3 Young & Jer. 230.

(f) *Hoby v. Bull*, 3 Bar. & Adolp. 350; *Wadsworth v. Marshall*, 2 June, 1832, MSS., *ante*, 26, n. (c); *Rowson v.*

Earl, 1 Mood. & Mal. 538.

(g) *Hill v. Featherstonhaugh*, 7 Bing. 569; *Templar v. M'Lachlan*, 2 Bos. & Pul. New Rep. 136.

(h) *Hill v. Featherstonhaugh*, 7 Bing. 569.

(i) 2 Geo. 2. c. 23, s. 23, and the recent clear decision that the same extends to all business at law or in equity transacted even in a county court, or upon a plaint as replevin, and is not confined to the superior courts or courts of record. *Wardle v. Nicholson*, 1 Nev. & Man. Rep. 353.

(k) 3 & 4 W. 4. c. 42, s. 26.

(l) As to *Champerty* and *Maintenance*, see 4 Bla. Com. 134, 5; *Penn's case*, 2

CHAP. XI.
RETAINER
OF A LEGAL
AGENT.

Construction
of 2 G. 2, c.
23. s. 23, as to
the necessity
for a month's
delivery of a
bill of costs (o)

stipulate to receive a large sum, as one hundred guineas, besides taxed costs, in case he should recover, and no costs in case his client should fail. (m) Indeed any stipulation out of the usual course of fair remuneration, or even an apparent gift by a client to an attorney pending a suit, is illegal and void; or at least, may in general be set aside in a Court of Equity. (n).

It has been observed, that the statute 2 Geo. 2, c. 23, s. 23, requiring the delivery of a bill "for any fees, charges, or disbursements at Law or in Equity a month before action thereon, in order that the same may be taxed," ought to be construed liberally; and Lord Eldon said, "Nothing ought to be guarded with so much jealousy as the right of suitors to have their bills of costs taxed;" (p) and Tindal, C. J., said, "that as the Act is remedial, it is better to draw in a case on the extreme verge than to leave it without;" (q) for the suitors cannot themselves know the value of the services of their attorneys; and therefore to prevent extortion, the bill of the attorney is required in one case as well as in another to be referred to a competent judge. (r) Accordingly, in a recent case, it was decided that the Act extends to business done as well in *Courts not of Record* (as the *County Court*), as in the *Courts of Record*; (s) and that as a replevin bond is properly preceded by a plaint in the County Court, which is the commencement of a replevin suit, the preparing and attesting the execution of such bond was a taxable item; and that although no bill had been delivered, the attorney could not sever his claim for money advanced in connection with that proceeding, and recover money disbursed by him professionally in relation to such bond or other proceedings in replevin. (s) So business done by an attorney of one of the Superior Courts, in the *Insolvent Court*,

Inst. 564; *Kenney v. Brown*, 3 Ridg. P. C. 502; *Stanley v. Jones*, 7 Bing. 369; *Marquis Chalmers v. Clinton*, 2 Jac. & W. 136; *Guy v. Gower*, 2 Marsh. R. 273; *Stone v. Yea*, Jacob's R. 426; and see several cases, Chit. Eq. Digest, tit. Barrister, and tit. Solicitor and Client, IV.

(m) *Guy v. Gower*, 2 Marsh. Rep. 273. Perhaps a power, by leave of a judge, to permit an attorney to stipulate for larger remuneration in difficult and doubtful cases, might safely be introduced; such a stipulation would prevent those hard bargains which are secretly made in consequence of the risk incurred, and constitute a protection to needy persons, who have claims which they wish to assert, and yet are not so impoverished as to be able to sue in

forma pauperis. Such a power might be so qualified as to prevent any risk of maintenance or champerty.

(n) See *Montesquieu v. Sandys*, 18 Ves. 302; and *Wood v. Downes*, 18 Ves. 120; *Wright v. Proud*, 13 Ves. 138; and other cases in Chit. Eq. Dig. tit. Solicitor and Client, IV. and the principle of the recent decision in *Popham v. Brooke*, 5 Russell Rep. 8.

(o) And see fully, Tidd. 9th ed. 325 to 341; and Chitty's. Coll. Stat. tit. Attornies.

(p) *Balme v. Power*, 1 Jacob. 307.

(q) *Smith v. Taylor*, 7 Bing. 259; 6 Moore & P. 66.

(r) In argument in *Wardle v. Nicholson*, 1 Nev. & Man. 362.

(s) *Wardle v. Nicholson*, 1 Nev. & Man. 355. The case of *Reynell v.*

in procuring an insolvent's discharge, is a proceeding *at law* within the meaning of the Act; (t) and business done under a commission of *Lunacy*, is taxable before a Master in Chancery. (u) It should seem, however, that it was considered in the above recent case, that there must have been some item either actually constituting the *commencement* of some proceeding in a *Court of Law or Equity*, or in some other *legal proceeding*, such as a commission or fiat in bankruptcy, or *pending* the same; (v) or at least some formal step *perfected*, or at least *prepared*, immediately antecedent to such proceeding, and essential for conducting the same. A charge for drawing and engrossing an affidavit to hold to bail, (x) or for preparing a warrant of attorney that was executed, (y) or even though it were not executed, (z) and a charge for a *dedimus potestatem* to take the acknowledgment of a fine, (a) and for attending at a lock up house and filling up a bail bond and obtaining the defendant's release, (b) and a mere charge for attending and advising a party in a suit, though no actual business had been done by the attorney, (c) and an item for business done under an extent, (d) have been holden taxable items. And though in one case it appears to have been considered that the drawing an affidavit of debt and bond to the Chancellor for the purpose of obtaining a commission of bankrupt, were not taxable items, it has been observed that there the affidavit had not been sworn, nor the commission issued; and that case seems to have been virtually overruled by others. (e)

But business *unconnected* with any suit or business at law or in equity, is not within the act; and, therefore, it has been held that charges in a bill for *searching* to see whether satisfaction of a judgment had been entered, or whether an issue had been entered and docketed; (f) and a charge for attending upon and concerting measures with the attorney of the oppos-

What charges
not within the
act.

Smith, 2 B. & Adol. 469, only applied to the statute 3 Jac. 1, c. 7, s. 1, and was an action by one attorney against another attorney. This case seems to overrule *Beck v. Wells*, 1 Crompt. & M. 75, A. D. 1832, as to business in a Court of Requests.

(t) *Smith v. Wattleworth*, 1 Car. & P. 615; 4 Bar. & Cres. 364; 6 D. & R. 510, S. C.

(u) *Jones v. Bywater*, 2 Crompt. & J. 371.

(v) *Id. ibid. Smith v. Taylor*, 7 Bing. 259; sed Alderson, J. diss.

(x) *Winter v. Payne*, 6 Term. R. 625.

(y) *Sandm v. Bourn*, 4 Camp. 68.

(z) *Weld v. Crawford*, 2 Stark, R. 538.

(a) *Ex parte Pricket*, cited 1 Nev. & Man. 362.

(b) 6 Bar. & Cres. 86.

(c) *Smith v. Taylor*, 7 Bing. 259; 1 Dowl. Pr. C. 212, S. C.; sed Alderson, J. diss.

(d) *Rex v. Collingridge*, 3 Price, 280.

(e) *Burton v. Chatterton*, 3 Bar. & Ald. 486, observed upon in *Wardle v. Nicholson*, 1 Nev. & Man. 355.

(f) *Fenton v. Correia*, 4 Ry. & M. R. 262; 2 Car. & P. 45, S. C.

CHAP. XI.
RETAINER
OF A LEGAL
AGENT.

ing creditor to resist the discharge of an insolvent, are not within the act. (g) And where an attorney had been obliged to pay money in consequence of his undertaking to pay the debt and costs, this was holden not to be a *disbursement* by him, as an *attorney*, within the meaning of the statute, (h) and not to be taxable. And a bill for proceedings in *bankruptcy* is not within this act, nor is it requisite that such a bill should be taxed under the 6 Geo. 4, c. 16; sect. 14, before the commencement of an action, although a charge for *obtaining a certificate* would be otherwise. (i)

When illiberal
to tax.

When an attorney has conducted the proceedings faithfully and zealously to a conclusion, whether fortunately or disastrous, it would be illiberal, if not ungrateful, to tax the same, unless the charges have been wholly unauthorized, or are exorbitant to a considerable amount; but, very discredibly to some opponent practitioners, they too frequently encourage, and even urge a taxation for that purpose, upon the most trifling objection. If the client should resolve to tax, he must, to avoid an action, take the proper proceedings, within the month, or he may within that time pay the amount, and afterwards obtain a taxation; and if the charge should turn out improper, the Court will oblige the attorney to refund; (k) but no *action* for the amount can then be sustained, for the remedy is in that case only by motion. (l)

When the delivery of a bill is unnecessary, and how then to proceed if it be unreasonable.

The statute 2 Geo. 2, c. 23, s. 23; in its terms extends only to "fees, charges, or disbursements at *law* or in *equity*," and these have unfortunately been construed to apply only to proceedings relating to some *suits* or proceeding in Court, and not to include charges for *conveyancing*, or otherwise not connected with a suit; (m) and yet it is in relation to charges of that nature that parties require most protection; because the proceedings in most suits are generally much the same, and the impropriety of the charges may, therefore, be readily detected; but in conveyancing, and charges for transacting the innumerable variations of business connected with the affairs of mankind, the assigning

(g) *Crowder v. Davies*, 3 Young & J. 433; but see *Smith v. Wattleworth*, 4 Bar. & C. 364, *ante*, 28, n. (f).

(h) 6 Taunt. 196; 1 Marsh. 539, S. C.

(i) *Taylor v. M'Gaugan*, 4 Car. & P. 96; and see *Crowder v. Davis*, 3 Young & J. 33—433; *Hamilton v. Pitt*, 7 Bing. 223; but now see 1 & 2 W. 4. c. 56; Tidd, 9th edit. 331; 2 Taunt. 321; 1 Rose, 119, as establishing that an attorney's bill for obtaining a bankrupt's cer-

tificate must be signed and delivered a month before he can sue thereon.

(k) 2 Geo. 2, c. 23; *Williams v. Firth*, 1 Dougl. 198.

(l) *Gower v. Popkin*, 2 Stark. 85; Tidd, 9th ed. 333; but see *post*, 31, note (p).

(m) M. 12 G. 2; *Anon*, K. B. Barnes, 41, 2, C. P.; and see Bul. Ni. Pri. 145; Tidd's Prac. 9th edit. 328, *ante*, 28.

a just limit to the charges by the clients themselves would be difficult, if not impracticable. Abstracts, deeds, and agreements, may be unnecessarily long, and numerous attendances wholly unnecessary; and it would, therefore, be well if bills relating to such transactions were taxable precisely as the costs of suits. At present, the only protection against extortion is the probity of the solicitor, and the competition which it might be supposed would induce small charges, in order to obtain reputation for moderation, and thereby increase business; but instances frequently occur of advantage being taken of the solicitude of clients for dispatch, as in the instance of marriage settlements, or of their pressing occasions for money. In cases where excessive charges of this nature have been made, and the party is not anxious immediately to obtain the money or deeds, the only course is to *tender* in due form (*n*) a sum rather more than will assuredly be in the opinion of a jury sufficient to pay all reasonable charges; and then under the advice of counsel, to proceed on an action of detinue, when sustainable, for the deeds, or against the other party, or the solicitor specially, for not completing the transaction according to the previous contract, and for damages, if any, resulting from the delay. But it very frequently occurs that there is immediate occasion for certain detained deeds, or for the money. In these cases, the exorbitant demand may be paid under protest, and without prejudice to an action to try the propriety of the charges, and which, in some cases, may be sustained, notwithstanding the general rule, that money paid after knowledge or means of knowledge that it is not justly due, cannot be recovered back (*p*). If the money be urgently wanted, in general the solicitor for the lender or grantee of an annuity will detain or deduct the amount, and then the only remedy would be an action, which perhaps might be sustainable under special circumstances, although in general questionable, unless there has been a previous and well

(*n*) As to the form and requisites of a tender, see *ante*, 1 Vol. 506, 7, 8.

(*p*) See *Bilbec v. Lumley*, 2 East. 469. In one case a mortgagor having given due notice of his intention to pay off the mortgage, pursuant to the terms of the deed, the mortgagor and his solicitor, at the appointed time and place, tendered the principal and interest, and a sum for reasonable charges for reconveyance, &c. but the mortgagee's solicitor insisted on being paid a further unreasonable sum of £50 for letters and attendance. The mortgagee having urgent occasion for the deeds, demanded them, and paid the full claim under

protest, and afterwards proceeded in an action against the solicitor for the surplus of reasonable charges; and though it was urged that the action was not sustainable, because the full money had been paid with notice of the objection, and was therefore not recoverable back; Lord Tenterden held that the action was sustainable, as there was urgent occasion for the deeds, and the defendant's detaining them was a species of duress, like the decided case of the payment of an exorbitant sum in order to get back goods from a pawnee, and the plaintiff recovered; and see *Stone v. Lingwood*, Strang. Rep. 651.

CHAP. XI.
RETAINER
OF A LEGAL
AGENT.

framed agreement to make the full advance. But, unfortunately, the difficulty and expense in recovering the money unjustly detained is so great that the party usually abandons the claim, and the pillage is perfected, and will continue to be repeated until the Legislature have subjected parties to a penalty, even for *asking* for more than is reasonable (*q*). The usury acts, 12 Ann, st. 2, c. 16, s. 2, prohibits solicitors and others from taking, directly or *indirectly*, more than at the rate of 5s. in the 100l. for procuring the loan of money, nor more than 12d. for making or renewing the security bond; and subjects each offender to indictment, and half a year's imprisonment, and to 20l. penalty (*r*); and the annuity act, 53 Geo. 3, c. 141, contains a similar clause against taking, directly or indirectly, more than 10s. per 100l. for procuring the loan. But these provisions are frequently *directly* violated, or indirectly so, by extravagant charges for the deeds, even where an attorney is himself the lender (*s*), and the payment of such charges is effected by the solicitor withholding the residue of the money. (*s*) In some cases, it has been held that such retention would invalidate the annuity (*t*); but in a subsequent case, the Court of King's Bench having taken from Easter Term till June 24, 1829, to consider the question, gave judgment, that the retention by the attorney of too large a sum for expenses was no ground for setting aside the annuity altogether, but that it should be referred to the master, to see what proportionable part of the annual sum should from time to time be deducted; so that according to the existing law, no immediate loss, penalty, or punishment accrues from such an attempted evasion of the statute; but the party is merely compelled to refund or allow the excess of reasonable fees, and perhaps pay the costs of the application (*u*).

Liabilities of
attornies, &c.

Generally speaking, an attorney, solicitor, or proctor, is not liable for the consequences of his mistake upon a point of law, upon which a reasonable doubt might be entertained, and even judges differ in opinion (*v*); and although an attorney's taking an opinion of counsel, and acting under it, does not absolutely

(*q*) The Usury Act, 12 Ann, c. 16, and the Annuity Act, 53 Geo. 3, c. 141, contain clauses against solicitors exacting, *directly* or *indirectly*, a brokerage of more than 10s. per cent., and subject them to *indictment* for the violation, *Ree v. Gillham*, 6 T. R. 265; 1 Esp. R. 285.

(*r*) *The King v. Gillham*, 6 Term. R. 265.

(*s*) See cases, Chitty's Col. Stat. page 26, note (*o*).

(*t*) Under s. 6 of 53 Geo. 3, c. 141;

1 Bing. 234; 8 Moore, 109, S. C.; 4 Bing. 26; 6 Moore, 491; 6 Bar. & Cres. 165

(*u*) *Girdlestone's case*, K. B. 24 Jan. A. D. 1829.

(*v*) *Kemp v. Burt and another*, 1 Nev. & Man. Rep. 262. See numerous instances of varying opinions of the judges, Moody's Crown Cases, per tot., and *Selby v. Bardsley*, 3 B. & Adol. 2, and *Wells v. Hopwood*, id. 20.

protect him, especially if the case were not diligently and properly stated; (*w*) yet it would be difficult to charge him with negligence where he, having *carefully* drawn a case, by fully stating the facts, evidence and points, with separate questions, and having obtained an *explicit opinion* of an experienced counsel, has acted strictly according to his directions (*x*). But an attorney is liable to be sued for any loss, damage, or delay, occasioned by his want of a due degree of knowledge, skill, or care, especially if the error be in his *practical department* (*y*); for although he might be excusable in coming to an erroneous conclusion upon points respecting the *substantial rights* of parties, it is incumbent upon him, at least, to be well informed, before he undertakes a suit or defence, of the proper *practical proceedings*, that being his more immediate department, and with respect to which he ought not even to have been admitted, if grossly deficient; and his obtaining his admission was in effect a legal fraud upon the judge. (*z*) As if a prisoner be superseded in consequence of the attorney not charging him in execution in due time (*a*). But, as above observed, if he mistake, even upon a point of practice, yet if it be a matter upon which a doubt could be reasonably entertained, he will not be liable (*b*). In cases of negligence of this description the Courts will not in general interfere summarily against the attorney, but will leave the party to his action; and in which the *jury* would have to decide upon the negligence, subject to the directions of the judge. (*c*) But when an attorney has been guilty of want of *integrity*, then, although no suit or proceeding has been pending, the Court will interfere summarily; and where an attorney assumed to act as a professional agent for parties abroad, and in consequence employed a proctor, and recovered prize monies and other proceeds for his employers, the Court summarily compelled him to account and 'pay over, although he had not done any act in Court in his professional character (*d*).

(*w*) *Godfrey v. Jay*, 1 Moore & P. 236; 6 Bing. 616. S. C. See other cases, *ante*, 21, 22.

(*x*) See *ante*, 22.

(*y*) *Russell v. Palmer*, 2 Wils. 325; *Swannell v. Ellis*, 8 Moore, 340; 1 Bing. 347, S. C.

(*z*) *Per Cur.*, 6 Bing. 460, 468; *Reece v. Rigby*, 4 Bar. & Ald. 202; *Pitt v. Yalden*, 4 Burr. 2060.

(*a*) *Lee v. Ayrton*, Peake R. 119; *Russell v. Palmer*, 2 Wils. 325; 4 Burr. 2061; for neglecting to have a witness in court, and consequent nonsuit, *Reece v. Rigby*, 4 B. & Ald. 202; for not dock-

etting a judgment; *Flower v. Bullock*, 1 Stra. 639; for want of care in examining the sufficiency of a security or title, *Brown v. Howard*, 4 J. B. Moore, 508; *Wilson v. Tucker*, 3 Stark. 154; *Ircam v. Pearman*, 3 B. & Cres. 799.

(*b*) *Ante*, 32, *Kemp v. Bent*, 1 Nev. & Man. 262; *Laidler v. Elliott*, 3 Bar. & Cres. 738; *Jacks v. Bell*, 3 Car. & P. 316; *Baikie v. Chandless*, 3 Camp. 617, 19.

(*c*) *Reece v. Rigby*, 4 B. & Ald. 202; *Bourne v. Diggles*, 2 Chitty's R. 311.

(*d*) *Re Woolf*, 2 Chit. Rep. 68; 4 Bar. & Ald. 77; *Ex parte Hall*, 7 Moore, 437; 1 Bing. 91, S. C.

CHAP. I.
OF ATTORNEYS
AND SOLICI-
TORS.

III. OF PROC-
TORS.

Proctors stand in the same relation in Spiritual, Ecclesiastical, and Admiralty Courts, as attornies at *Law* and solicitors in *Equity*. They must before they can practise have served as a clerk for five years under articles, and which are liable to the same stamp duty, and to similar provisions as the articles of an attorney or solicitor. (e) They also must have been examined and admitted; and they must also obtain an annual certificate; (f) and they also are prohibited from suffering unqualified persons to use their names, (g) and from acting as a justice of the peace whilst they continue in practice. (h) Their general duties, rights, and privileges, stand on the same principles as those of attornies and solicitors; and we have seen some valuable observations of Lord Stowell upon parts of their duty and conduct. (i)

IV. OF CERTI-
FICATED CON-
VEYANCERS.(k)

Before the Act 44 Geo. 3, c. 98, sect. 14, there was no direct recognition of that description of legal agents, now called *Certificated Conveyancers*, and they seem to have been allowed to practise rather for revenue purposes than upon any principle of sound policy. Before that act, and indeed since, upon being entered and becoming a member of one of the Inns of Court, for which is to be paid 25*l.* (required by the subsequent Act, 55 Geo. 3, c. 184, schedule, tit. Admission and Certificate), and also upon paying for an annual certificate of 12*l.* or 8*l.* according to time and distance, any person, however insufficiently educated, and however ignorant of the legal profession, such as inferior schoolmasters and unadmitted or discarded lawyers, are allowed to draw conveyances and deeds, and other documents relating to real and personal estate, thereby interfering with the fair profits of regular practitioners, though ultimately by their blunders frequently occasioning a compensatory return of litigation. The first statute enacts, that any person who has not obtained the stamped certificate, as required by that act, and by the subsequent Stamp Act, 55 Geo. 3, c. 184, schedule tit. Certificate, and which must be impressed with the duty of 12*l.*, if the party reside in London or Middlesex, or within the limits of the twopenny post office, or if elsewhere in England, 8*l.*, and who shall for or in expectation of any fee,

(e) 55 Geo. 3, c. 181, Schedule, tit. Articles of Clerkship.

(f) 25 Geo. 3, c. 80, s. 11.

(g) 53 Geo. 3, c. 127, s. 8, 9.

(h) 5 Geo. 2, c. 18, s. 2.

(i) *Ante*, 23, 24.

(k) The following observations merely

relate to those certificated conveyancers who have not been members of the profession, and duly educated as such, and do not apply to regular conveyancers, who are really learned in the law of real property.

gain, or reward, draw or prepare any *conveyance* or *deed* relating to any *real or personal estate*, or any proceedings in law or equity, pay a penalty of 50*l.* for each offence (unless he be a serjeant at law, or barrister, or a solicitor, attorney, proctor, agent, or procurator, having obtained a regular certificate, or a special pleader, draftsman in equity, or *conveyancer*, being a member of one of the four Inns of Court), and having obtained a stamped certificate as thereby required. But the act *exempts* persons solely employed to *engross* any deed, instrument, or other proceeding, not drawn by themselves, and for their own account; and also excepts public officers drawing or preparing official instruments, applicable to their respective offices, and in the course of their duty; and also excepts and authorizes *any* person drawing or preparing any *will*, or any other *testamentary papers*, or any *agreement not under seal*, or any *letter of attorney*.

The 55 Geo. 3, c. 184, schedule, title *Certificate*, by using the words “*being a member of one of the four Inns of Court*,” impliedly introduced a wholesome restriction by requiring, not only the stamped certificate of 12*l.* or 8*l.*, but also an *admission* by the benchers of one of those inns, at the cost of 25*l.* (1) For a time, the other fees paid by such certificated conveyancers to the respective inns, constituted a strong temptation to indiscriminate admission without sufficient enquiry. But, in consequence of improper persons having thus been enabled to practise, the benchers of the Inner Temple set the laudable example of instituting a rigid enquiry before they would admit. But still too many improper persons contrive to obtain admission and practise to a considerable extent, and a correspondent injury to more regular solicitors, who have paid the large duty on their articles, and probably paid for clerkship a considerable premium, and duly served under their articles for five years, and also occasioning material detriment to the community. (m)

It will be observed, however, that though the 44 Geo. 3, c. 98, extended only to *Conveyances* and *Deeds*, and those only when they related to personal or real estate, the 55 Geo. 3, c. 184, schedule, tit. *Certificate*, appears to extend further, to “*any instrument*,” whether or not it be a deed, and to any deed or “*contract whatever*.”

(1) See *Edgar v. Hunter*, Holt's Cases Ni. Pri. 528.

(m) Some of these certificated conveyancers, in league with inferior prac-

tioners, besides causing innumerable blunders, and bad titles to estates, excite much unnecessary litigation amongst the lower orders of society.

CHAP. I.
OF ATTORNEYS
AND SOLICI-
TORS.

It would seem necessarily to follow from these enactments, that when a certificated conveyancer has been duly licensed to act, and has acted within the scope of his authority, he may recover for his reasonable fees; and accordingly it has been so expressly decided (*n*); and a bill for mere conveyancing need not be delivered a month before the commencement of an action for the amount; (*o*) nor can it in general be taxed; (*p*) though if one bill has been delivered for costs in Court, and another for conveyancing, the Court may direct both to be taxed; (*q*) and if a bill has been delivered, partly for such costs, and partly for conveyancing, the whole may, as a matter of course, be taxed. (*r*)

V. OF NOTA-
RIES.

Notaries also may be considered a description of law agent. Their department is of very ancient date, and existing in every state of Europe; and their acts have long, by common consent of merchants, and courts of all nations, had peculiar weight and respect attached to them. (*s*) A notary, before he can act must, by indentures of apprenticeship, have been bound to serve for the term of seven years as a clerk or apprentice to a duly admitted and practising public notary, or to a scrivener, who is also a notary by the custom of London (*t*); and such indenture must have been duly stamped as an indenture of apprenticeship (*u*); he must also have continued in *such* service, and be actually employed during the whole term; (*v*) and he must *bona fide* and exclusively serve such notary in his department; and therefore we have seen, that where the clerk had, during the mornings of his service, attended at a banker's, and only resorted to the notary's after five o'clock, the Court of King's Bench refused a mandamus to admit him to practise as a notary. (*w*) In order to be admitted to practice, a faculty is to be obtained from the Court of Faculties, (*x*) and upon which, when in England, a stamp duty of 30*l.* is imposed; (*y*) and if he be guilty of misconduct he may be struck off the Roll of Faculties, (*z*) and any un-

(*n*) *Poucher v. Norman*, 5 D. & R. 648.

(*o*) *Hooper v. Till*, 1 Dougl. 199: but semble, that a charge for *advising* relating to an *action*, may be considered as a taxable item. 7 Bing. 260; Alderson, dissentiente; *ante*, 29 note (*c*).

(*p*) Tidd. 9th ed. 328, cites 1 M. 12, G. 2; *Anon.* K. B., Barne, 41, C. P.; and see Bul. Ni. Pri. 145.

(*q*) Sayer, 233.

(*r*) *Hooper v. Till*, Dougl. 199.

(*s*) See in general Chitty on Bills of

Exchange, Index, tit. Notaries; Burn. Eccles. Law, tit. Notaries.

(*t*) 41 Geo. 3, c. 79, s. 2; and see 44 Geo. 3, c. 98, s. 14.

(*u*) 55 Geo. 3, c. 184, Schedule, Apprenticeship.

(*v*) 41 Geo. 3, c. 79, s. 2, 7, and 8.

(*w*) *Ante*, 11 note (*e*). *Res v. Scrivener's Company*, 10 Bar. & Cres. 511.

(*x*) Described by 41 Geo. 3, c. 79, s. 3, 4.

(*y*) 55 Geo. 3, c. 184.

(*z*) 41 Geo. 3, c. 79, s. 10.

authorized person acting as a notary for profit, is subjected to a penalty of 50*l.*; (a) but Proctors, and the Secretary to any Bishop, and certain other persons, are expressly excepted. (b)

CHAP. I.
OF STUDENTS,
SPECIAL
PLEADERS, &c.

The 1 & 2 Geo. 4. c. 48. s. 3, enacts that the above act, 41 Geo. 3. c. 79, shall not extend to Registrars or Solicitors of the Universities; and the recent act, 3 & 4 W. 4. c. 70, also exempts attornies and solicitors and proctors from the necessity of serving an apprenticeship to a notary, before they can act as such at any place distant from London *more* than ten miles, but then he must be admitted so to practise by the Court of Faculty. (c)

The 44 Geo. 3. c. 98, expressly excepts notaries; and consequently a notary may, for profit, draw or prepare any conveyance, deed, contract, or document whatever, although he is prohibited from being concerned for profit in any action or suit.



With respect to students, special pleaders, conveyancers, and barristers, there is not at present any *statute* or *regulation* prescribing any precise course of study or *examination* as regards *legal* competency before he is admitted to practise, although there is a general *unqualified superintending control*, and final decision as to his general fitness to be called to the bar, reposed in the benchers of the Inn of Court of which he must have become a member by admission as a student. The absence of any regulation respecting the *legal* education, or requiring actual observance of any sedulous study, may be attributed to three circumstances; *first*, that many men are called to the bar merely for a collateral object, and not with any view to actual practice in the law, at least in England; *secondly*, from the supposition that as they would only be employed in practice through the intervention of an attorney or solicitor, their legal competency would probably be justly appreciated, and therefore, no unintelligent person would be prejudiced, as might occur in the employment of an ignorant attorney; and, *thirdly*, that men usually of more enlarged education, who have finished a college, or other superior scale of education, will naturally, of their own accord, in furtherance of their own ambitious views, take care so to qualify

VI. OF STUDENTS FOR THE BAR, SPECIAL PLEADERS, CONVEYANCERS, AND BARRISTERS.

(a) 41 Geo. 3, c. 79, s. 11. See exceptions and observations in *Candler v. Candler*, 1 Jacob. R. 231, 2.

(b) 41 Geo. 3, c. 79, s. 14.

(c) It has been complained that that Court demands 50*l.* on such admission, besides the stamp duty, which operates as an exclusion, contrary to the act.

CHAP. I.
OF STUDENTS,
SPECIAL
PLEADERS, &c.

themselves as to merit professional approbation, and consequently to attain the profit and honors that may be expected to result.

The regulations, therefore, as concisely described by Mr. Tidd, have, until lately, merely required that before attempting to practise as a barrister, the party shall have been a member for a *certain term* of years of one of the four principal Inns of Court, *viz.* for *five years*, unless he has taken the degree of Master of Arts or Bachelor of Laws at one of the Universities of Oxford, Cambridge, or Dublin, in which case *three years* standing as a student will suffice. The stamps and fees of entrance vary but little in each Inn, but generally amount to about 30*l.*, of which 25*l.* is for the stamp, under the 55 Geo. 3, c. 184, schedule, Admission, and 1*l.* for the stamp on the bond executed by him as a student with his sureties, conditioned for the payment of all dues, and some other acts; and by a modern regulation, 100*l.* (*d*) must be deposited by a student at least twelve terms before he can practise even as a special pleader, unless a certificate be produced of his being a member of the College of Advocates, in Scotland, or a member of one of the Universities of Oxford, Cambridge, or Dublin; but which is returned or allowed to him on being called to the bar, after deducting expenses and arrears, if any, of duty; or, in case of death or quitting the profession, will, subject to just deductions, be returned. In each of the Inns of Court a student must also, in all cases, keep at least *twelve* terms; and for this purpose, to secure his appearance before the benchers, he must actually attend and dine in Commons, in the presence of the benchers, at least three days, at certain periods, in every term, before he can practise even as a special pleader; that is to say, two days in each of two separate half weeks in each term, and one day in the grand week of such term. (*e*)

These regulations, it will be observed, bring together in the respective halls of each Inn of Court, young men intending to be called to the bar during the law terms, although it might appear only for the purpose of dining there. Formerly there was provided some actual *legal* instruction, by the appointment of competent persons, termed *readers*; and we find, from Callis on Sewers, and other authorities, that students then received public instruction offered to them, although not perhaps compelled to attend. For some time, also, questions were propounded by the readers to the students, and they were compelled to answer them

(*d*) 51*l.*, part of this 100*l.*, is to pay the government stamps on admission to the bar.
(*e*) Tidd. 9th ed. 41, 42.

as exercises. But this practice fell into disuse ; and in recent times instances have certainly occurred of assiduous students anxiously pressing for an examination and a hearing ; but the pecuniary composition was preferred. This abandonment of the ancient system of lectures and of actual exercises was attributable, not to any want of anxiety on the part of the benchers to afford information to students, but from the want of any compulsory power to enforce attendance, and from the circumstance of students considering that *private* study of such a subject as law, is preferable to any *public lectures*, however ably prepared and delivered. It is certain, however, that students generally ceased to attend, and therefore the lectures were unavoidably suspended ; at length, and recently, the benchers of the Inner Temple have introduced a rule instituting a strict examination of youths offering themselves *before they can be admitted even as students*, and subjecting them to other rules. As such examination takes place before any considerable progress can have been made in the study of law, they are of necessity confined to their *classical* attainments and education, and general fitness in respect of parentage and society, to be ultimately called to the bar. But although by this wholesome enquiry persons of too limited education, or objectionable habits, may be excluded or at least delayed ; yet this is in the first instance, and before any considerable expence can have been incurred, or time lost in the study of the law ; so that no injustice or hardship can ensue, as might be urged was the case when students were not examined in respect of their fitness by the benchers until at the *end* of five years, and then rejected.

Moreover, before a student can be called to the bar, he must, by the rules of most of the Inns of Court, produce a certificate of approbation, signed by one or more benchers, as well to be admitted as a student as to be proposed for the bar, and seconded by one or more of the benchers of his own inn ; and without their consent he cannot be admitted, nor need the benchers, either collectively or individually, assign any reason for their refusal. So that, independently of any legal qualification, which is rarely much regarded by the benchers, any *ungentlemanlike* conduct, and still more any *moral delinquency*, would probably constitute an insuperable objection ; because, as before suggested, it is of the utmost importance that in a society like that of barristers, who in general congregate and must be exposed to collision with each other, no objectionable individual should be admitted ; and although there is in form an appeal to the twelve Judges, yet as in general two or three of them are benchers of the same inn,

CHAP. I.
OF STUDENTS,
SPECIAL
PLEADERS, &c.

the appeal would be in substance *ab eodem ad eundem*, and no instance of a successful appeal can, it is believed, be adduced. (f) The consideration of these circumstances should deter parents and friends from attempting to introduce an ill educated or irregular youth into the higher departments of the profession, by which he would probably be exposed to much mortification, if not total disappointment.

At present, except from the regulation and examination in the Inner Temple, and from the known necessity for general propriety of conduct during the state of pupillage, so as not to offend decorum or otherwise induce the benchers to refuse admission to the bar, the principal benefit resulting from these institutions is the forming an *esprit de corps*, and advantageous association between the students, which enables them to compare each other's attainments, and sometimes, as North, in his life of Lord Keeper Guildford, recommends, exercise the *ars hablativa*, or legal discussion, which is certainly promoted by legal students at certain times of the year, resorting to the different inns of court, and naturally enquiring and arguing upon the subjects of their legal pursuits. (g) Ere long it may be hoped that public lectures for students at each of the inns of court will be revived, or rather again instituted, on an improved system, as laudably intended by the Law Institution as regards articled clerks. At the same time it will ever be found, that *substantial* knowledge of the law will be best attained by assiduous *private reading and research*, under the direction of an experienced barrister, special pleader, equity draftsman, or conveyancer.

In modern times *legal* knowledge has usually been attained by *private* study, assisted by two or three years sedulous pupillage in the chambers of a special pleader, equity draftsman, or conveyancer, from which, together with *private* lectures, a party, especially after a college or other scientific education, may obtain a just view of the points to be known, and the outline of practice. Sound, and accurate legal knowledge, and the power of ready reference to prior decisions (so essential to give legal weight and authority to all positions) can only be acquired by private, deliberate, and assiduous reading and study; *memory* depends principally upon *attention*, and the repeatedly taking a comparative view of the knowledge already acquired, so as to ascertain its accuracy: and strength of mind is not so much acquired by a continual and crowded accession of *new ideas*, as

(f) *Ante*. 3 & 4.

(g) See North's Life of Lord Keeper

Guildford, 1 Vol. 20, &c.

by accurately comparing the relations of those ideas which we have already received. (*h*) The cause of failures at the Bar is principally *indolence*, and consequent *ignorance*, or at least want of readiness and ability to apply the small acquisition of knowledge; (*i*) and perhaps above all to the circumstance of young men having within these few years commenced practising for themselves long before they have become qualified (*k*).

But let it be understood, that legal knowledge alone will not enable a barrister, in the present extended state of general education, to attain any eminence excepting perhaps merely for legal lore and chamber practice. He ought, before he even *commences* the study of the law, to have acquired a competent knowledge of physics, mathematics, mechanism, and even of the principal accomplishments and of general literature, since so much of the time of courts of justice is now and increasingly will be, occupied in discussing questions relating to patents, and every branch of arts and sciences. (*l*)

Other attainments besides the law.

(*k*) See a full note on the study of the Law, 1 Bla. Com. by Chitty, 1 Vol. 29, 37, note 9.

(*i*) Men *talk* of *hard study*, but very few indeed read *well* for even *four* hours in the day; *six* hours really well employed might suffice.

(*k*) It has become the practice, almost without any previous study, to continue as a pupil in a pleader's or conveyancer's office for a very short time (perhaps scarcely a year) as if merely to obtain the reputation of having been there. When at least *two*, if not *three* years close attention to the practice, in the preceptor's chambers, is essential. It is really scarcely honourable to endanger the interests of clients by assuming to practise upon such very slender information, as of late has been customary. If this practice be attributable to the amiable desire of *sons* to relieve their parents from expence, the *latter* should take care to prevent the baneful influence of any such sentiment.

(*l*) See an interesting outline of the proper objects of an enlarged education,

in Dr. Arnott's Elements of Physics or Natural Philosophy, General and Medical, 4th edition, Introd. *per tot*, and where he suggests the different departments of knowledge essential to be attained, and arranges them under four heads, and in the following order. A student for the law should, before he commences, consider whether he has acquired at least a general knowledge of all, or most of the enumerated sciences; and if not, then consult one or more eminent legal friends, which, if any, can be safely dispensed with, and complete his *previous* education accordingly; and when he has acquired the requisite general knowledge he may, upon commencing his legal career, ascertain upon which of the same subjects it will be advisable to *fill up* his leisure hours, which, particularly at first, he may subtract from legal study. But he must remember that the law is a jealous science, and requires, after a liberal education has been attained, almost exclusive attention at least for a few years :

1. Physics.

Mechanics,
Hydrostatics,
Hydraulics,
Pneumatics,
Aoustics,
Heat,
Optics,
Electricity,
Astronomy,
&c.

2. Chemistry.

Simple Substances.
Mineralogy,
Geology,
Pharmacy,
Brewing,
Dyeing,
Tanning,
&c.

CHAP. I.
OF STUDENTS,
SPECIAL
PLEADERS, &c.

Information got up for the occasion, and not the result of an extended well informed mind, will ever be clumsy, and communicated with embarrassment, and lose its due effect with a jury; nor can there, without a *general* store of information, ever be distinguished ability or power in *reply*, (*m*) or of illustration in argument, or brilliancy of imagination, by which the accomplished advocate so frequently captivates and carries away a jury. Hence there should be no limit to the extended studies of a barrister (*m*).

The functions of special pleaders, equity draftsmen, conveyancers, and barristers.

The *professional* occupation of a *Special Pleader* is to give *verbal* or *written opinions* upon statements, which may also be verbal or written, and to draw *pleadings*, civil or criminal, and such *practical proceedings* as may be out of the usual course. The *Equity Draftsman* confines his attention to questions, pleadings and proceedings arising in equity. The *Conveyancer* advises upon titles and rights to property, whether personal or real, and he prepares, in cases of importance or difficulty, deeds, contracts, and wills, whether they relate to the person, or to personal or real property. The chamber practice of *Counsel* is the same as that of a pleader; but his principal and more lu-

3. *Life.*

Vegetable Physiology,
Botany,
Horticulture,
Agriculture,
Animal Physiology,
Zoology,
Anatomy,
Pathology,
Medicine,
&c.

4. *Mind.*

Intellect,
Logic,
Mathematics,
&c.
Motives to action,
Emotions and Passions,
Morals,
Government,
Political Economy,
Theology,
Education.

I cannot refrain from adding two further suggestions, for the employment of leisure hours, and constituting parts of the above list of attainments; *First*, to study *Anatomy, Physiology, Pathology, Surgery, and Chemistry, and Medical Jurisprudence and Police*. I have, in order to assist in that department of reading, undertaken a work expressly for the purpose, entitled, "*Treatise on Medical Jurisprudence and Police, &c.*" Those subjects are practically, intimately connected with *legal* proceedings, especially in the Criminal Courts. But, *secondly*, it will not suffice to study the above enumerated *sciences*; for all lawyers should study *mankind*, so as to be able to detect, under every semblance, the exact character of every individual with whom he is to have transactions in business. In this respect the Scotch education surpasses the English. It may not appear a very amiable

department of *discernment* to pry into the characteristics of others, but it is especially essential for all whose avocation compels them to discriminate in their associations with mankind, and especially to elicit truth from witnesses. I trust I shall be understood to exclude so prying a habit from the social intercourse of friends and acquaintance.

(*m*) The ability of an advocate is more displayed in *reply*, whether upon law or fact, than in his original speech which might be laboriously prepared. In reply, he may evince a thorough comprehensive general knowledge of the subject, since he could not otherwise anticipate the new views and points that might be taken by his opponent, and which would embarrass or confuse an advocate if he be only capable of observing upon a very limited store of knowledge, whether of fact or law.

crative and pleasurable department is in Court, either in Bank or full Court, or at Nisi Prius, before a single judge and jury.

With respect to *opinions*, some counsel scarcely do more than answer the question in the affirmative or negative, and sometimes only in the monosyllable "yes," or "no," without assigning any reason or referring to any authority; contending that the sanction of their general opinion only is required, and not an argument in support of it. (n) From such individuals, the authority for their assertion may stand so high as at least to sanction, or protect from censure, the solicitor who acts under it. But such an opinion can be of no other utility. The scientific mode of advising always observed by a counsel, who was justly celebrated for his superior learning, was the model which should be invariably adopted. (o) He always gave, as far as the state of the law would allow, *First*, a direct and *positive* opinion, meeting the very point and effect of the question; and separately, if the questions were properly divisible into several, so as to satisfy the object of the querist, and be intelligible to the meanest capacity. *Secondly*, he succinctly stated his several *reasons* in support of such opinion. *Thirdly*, he shortly referred to the statute, rule, and decisions upon the subject; and when advisable, as when they were of doubtful application, shewed in what respect they were analogous. *Fourthly*, if, from the nature of the case, the facts were obviously or probably susceptible of a small shade or difference in statement, which might have escaped the enquiry of the solicitor, and might lead to a different result, he would suggest the possibility of such variation, and how it might affect the result; so that the solicitor would necessarily perceive the necessity for stating a further case, or, which is frequently more useful, have a conference, which would lead to a more certain ascertainment of all the facts. By this means, in the earliest stage of litigation, and before any considerable expence had been incurred, the law and the facts were quite, or nearly as fully ascertained as upon the trial, and the result might be justly and correctly anticipated. *Fifthly*, when he was doubtful whether some important fact did not rest principally on the statement of the party interested, without having ascertained the evidence, he would suggest the necessity for enquiring in what way it was proposed to prove each fact. *Sixthly*, when he apprehended that the prefer-

CHAP. I.
OF STUDENTS,
SPECIAL
PLEADERS, &c.

Opinions and
their requisites.

(n) The late Sir Vicary Gibbs and Sir James Mansfield, celebrated for the number and accuracy of their opinions, usually wrote such concise opinions, and sometimes merely suggested, "as the question is of considerable value,

"it may be worth while to try it."

(o) Mr. Baron Bayley. N. B. The costs of taking an opinion on the case and evidence and of a consultation, are now allowed on taxation between party and party.

CHAP. I.
OF STUDENTS,
SPECIAL
PLEADERS, &c.

able process, or pleadings, might not be adopted by the attorney, or the special pleader, he would even suggest what course in that respect should be adopted. *Seventhly*, and lastly, if from the nature of the case, it occurred to him that some useful precautionary measures should be taken, he volunteered the proper suggestions. After such an opinion, attentively observed by a careful attorney, it was but rare that the client failed in his action or defence.

Pleadings.

With respect to *Pleadings*, a scientific pleader or advocate will not encumber the record with unnecessary statements, or complicated counts or pleas. The late Mr. Justice Dampier rarely suffered more than one count to be introduced into a declaration; but then he took care first well to ascertain the facts, and he already knew the law. Precedents should merely *assist*, and never govern; whilst now, too frequently, as many counts are inserted as any antecedent printed or manuscript precedent on the subject has ever contained: and if it be asked why there are so many, the observation will be, because if one should be objected to then the answer may be, there is another; and if that also be deficient, then that there is another, and so on until it is to be hoped that the Judge may be tired with the objections, and may say, Well, amongst so many I suppose there is probably one sufficient count, and therefore I will not nonsuit. But no one can contend that this is scientific pleading, or worthy of a liberal practitioner; as Dr. Johnson apologized for writing *a long* letter “because he had not time to write a short one—i. e. to consider and compress;” so the circumstance of a declaration or other pleading being very lengthy, in general indicates that it was framed hastily, or that the pleader had not sufficient knowledge of the law, or strength of mind, to enable and embolden him to compress. To these observations, however, there may be exceptions, where the facts or the law are so doubtful as in prudence to require *variations* in the modes of statement, so as to meet whatever may even possibly be the result; and where a particular Court, or even a single Judge, is known to entertain a peculiar opinion upon a point differing from others, the careful pleader should, to avoid even discussion, conform even to such erroneous impression upon such subject. (q)

(q) In a well known case it singularly so happened, that each of the four Judges of the Court of King's Bench differed from each other upon points of pleading. The discreet counsel anticipated the difficulty, and drew *four varying* counts, viz.; one to meet the opin-

ion of each of the Judges; and, in consequence, they all concurred that upon the *whole* record, on one or other of the counts, the plaintiff was entitled to recover, although neither could concur upon which particular count.

It is grateful to the profession, and must be satisfactory to the public, to observe upon the present state of the former with regard to integrity and honor. *Formerly*, we had a celebrated lawyer, soon afterwards a Judge, unblushingly reporting of himself, as if it were matter upon which he plumed himself, that the Court had reproved him “for pleading subtly and deceptively, in order to trick the Court;” (*r*) and so late as A. D. 1761, we find an instance of such *malevolent* and *dishonorable feeling* in a barrister, evinced in causes in which he was personally interested, as his boasting that he had drawn the declaration in a lengthy and intricate way on purpose to *catch* the defendant, and to *scourge* him with *a rod of iron*; and that he had so improved the art of pleading that the paper book would amount to 3000 sheets, and he would ruin his opponent; and whereupon the Court directed the settling the issue in a quarter of a sheet of paper. (*s*) Happily no such degrading instances of contemptible conduct have in modern times occurred, (*t*) and the public will find the Bar universally as anxious for the improvement of the law, and the practice of it, as any suitor of the Courts; and even though the changes may demolish their respective incomes, yet they will still ever be found ready gratuitously, and even with increased zeal and energy, to advocate the claim of the poor or the oppressed.

(*r*) 1 Saunders Rep. 327 (*a*).

(*s*) *Yates v. Carlisle*, 1 Bla. R. 270.

(*t*) See ancient instances, Chitty's

Eq. Dig tit. Barrister, p. 184; and see Harrison's Index, tit. Barrister.



CHAPTER II.

PROCEEDINGS BETWEEN THE RETAINER AND THE
COMMENCEMENT OF LITIGATION.

1. Consideration who is the party legally injured, and modes of ascertaining the same	47	letter before commencement of proceedings -	56
2. Who the wrong doer, and modes of ascertaining the same	48	8. Offer of apology or compromise -	57
3. What is the ground of complaint, and how to be ascertained	52	9. Offer of security on giving time, and what security -	59
4. What is the evidence of cause of action, and of ascertaining the same	53	10. Notices, tenders, and demands on part of plaintiff. -	60
5. Of bills of discovery in general	54	11. Demand of copy of warrant. -	61
6. Demand of proper security, in lieu of one defective	55	12. Notices of action. -	63
7. Propriety of attorney writing a		13. Notice of attorney's lien. -	69
		14. Enumeration and selection of remedies. -	70
		15. Of Retaining counsel. -	71

CHAP. II.
PROCEEDINGS
BETWEEN THE
RETAINER AND
COMMENCE-
MENT OF LITI-
GATION.

Subjects of
this chapter.

AN injury having been sustained, and cause of action complete, and a competent legal agent having been retained, it next becomes necessary to consider several points antecedent to actual litigation. We have in the preceding volume suggested some preliminary precautionary measures to be taken; but, besides those, there are, before the actual commencement of litigation, several points to be considered in this chapter, viz.

FIRST, who was the party in legal contemplation injured, or who is the party to sue? *Secondly*, who was the wrongdoer, or party liable to be *sued*; and if doubtful, how are the facts to be ascertained? *Thirdly*, what is the cause or *ground of complaint*; and if doubtful, how is it to be ascertained? *Fourthly*, what is the *evidence* in proof of the whole cause of complaint; and if doubtful, how is it to be ascertained? *Fifthly*, of bills of discovery in general. *Sixthly*, demand of a sufficient security in lieu of one that is deficient. *Seventhly*, the propriety of the attorney *writing a letter* to the opponent before the commencement of any proceedings. *Eighthly*, the consideration of any offer of apology or compromise. *Ninthly*, the proposal of security on obtaining time, and considerations thereupon. *Tenthly*, notices of tenders and demands on the part of the plaintiff. *Eleventhly*, the demand in some cases of a copy of a warrant. *Twelfthly*, the notice of action to a justice. *Thirteenthly*, notice of

the attorney's or solicitor's lien or claim for costs. *Fourteenthly*, enumeration of the several remedies, and which is to be preferred. *Fifteenthly*, the retainer of Counsel.

CHAP. II.
PROCEEDINGS
BETWEEN, &c.

First, It would seem on first view that no difficulty could arise in determining *who is the party injured?* and the answer would naturally and simply be, the party who has sustained the *inconvenience*. But this is by no means true in every case; and perhaps no branch of the law is occasionally more difficult than that respecting who is to be the proper plaintiff or plaintiffs *at law*? Courts of *Law*, in general, only recognize *legal* rights, and therefore an action of ejectment cannot, excepting against a mere trespasser within twenty years, be sustained on the demise of a cestui que trust, but the demise must be in the name of the trustees. (a) And an assignee of a bond, or chose in action, (excepting a bill of exchange or promissory note) must sue in the name of the obligee, and cannot proceed in his own name. These general observations will here suffice; the authorities and practice will hereafter be more fully considered, as well as regards the plaintiff at *Law* as the complainant or orator in *Equity*. But all questions as regard the party to a suit at law require consideration in the first instance, not only because an error would in general be fatal on the trial of any proceeding, but also because an attorney should secure proper authority to proceed, as well on behalf of all legal as well as equitable parties, the latter of whom would have to pay the costs; and so as to enable him even to write his preliminary letter upon the authority of every person legally or beneficially interested, and prevent any offence on account of their not having been previously consulted, which sometimes induces parties afterwards to release, or otherwise impede the proceedings. We have seen, that as regards the real or formal claimants of property, they may sometimes be unknown; and that in those cases, it is the proper course for executors and administrators, before they can venture to divide the personal assets, to advertise for *creditors*; or before they divide the residue amongst remote kindred, to advertise for near. (b) Those instances will suggest the expediency of *public advertisements and other proceedings* in various cases, to ascertain who ought to be the plaintiff at Law or in Equity. It may also occur, that an agent or other party who has the possession of

First, who is
the party in-
jured, or who
to sue.

(a) *Ante*, Part I. pages 6, 7, 8.

(b) See the utility of advertisements for creditors. When that has been made, although the creditors may appear and claim at any distance of time, yet it will

not be to the prejudice of the executors in payment of legacies after a year. *Greig v. Somerville*, 1 Russ. & M. 338, *ante*, 1 Vol. 554.

CHAP. II.
PROCEEDINGS
BETWEEN, &c.

title deeds, or other documents, disclosing the parties to a title, or to a contract, or other proceeding, will refuse to produce them, and in such cases, after a courteous and proper formal application, it may become necessary to file a bill for a discovery and production of the document, in order to ascertain the proper party to sue and be sued, as well as the cause of action.

Secondly, who was the wrong-doer liable to be sued, and how to ascertain the facts.

Secondly, although in *direct* injuries it might be supposed that no difficulty could exist as to *the party to be sued*, it is sometimes otherwise; and in cases of malicious injuries, they are frequently on purpose committed so cautiously as to render discovery of the real wrong-doer exceedingly difficult. And yet of necessity, in general, the sufficient discovery should be obtained before the commencement of any proceeding at law.

In cases, whether of torts or contracts, after exhausting every other *civil* means of ascertaining who is the party liable to be sued, it should seem that a written *advertisement*, stating the injury and offering a reward for the discovery of the perpetrator, but taking care to avoid any libellous expression, would on principle be legal. (c)

In the case of a libel in a newspaper, the proprietors are obliged to disclose their names and places of abode, by filing an affidavit at the Stamp Office; and the act declares that production of a certified copy thereof and of a copy of the paper, shall be received in evidence against them of their liability. (d) But that enactment does not extend to any person who is not the proprietor or publisher; and therefore to connect the former with the publication, endeavour should be had to produce the manuscript he delivered to the printer. (e) The Stage Coach Act requires the proprietors of a coach to paint thereon the names of the proprietors, and the inscription or plate is to be evidence against them. (f)

If the printer of a libel promptly give up the original author, or discover the person who brought the paper to him, this is legally and equitably considered as ground of mitigation; (g) and in general it is advisable, on his payment of any costs

(c) *Ante*, vol. i. 453, 4.

(d) 38 Geo. 3, c. 78, s. 1, 2, &c. 9, 10, 11. *Rex v. Amphlett*, 4 Bar. & Cres. 35; 6 Dowl. & Ry. 125; *Cook v. Ward*, 6 Bing. 409; 9 Bar. & Cres. 382. In *Mayne v. Fletcher*, 9th May, A. D. 1829. K. B. Jones, Serjeant, moved for a new trial, and the Court held, that the production of any newspaper sufficed, under the 11th section of the Act, with-

out proof of the defendant's publication thereof; and per Bayley, J. It is only *prima facie* evidence, and the defendant may shew that some other person has published a false copy. MS.

(e) *Adams v. Kelly*, 1 Ryan & Moody's R. 157.

(f) 2 & 3 W. 4, c. 120; *Barford v. Nelson*, 1 B. & Adolp. 571.

(g) *Anon.* 2 Atk. 472.

already incurred, to abandon the proceeding against him, and to proceed only against the principal wrong doer. In cases of trespass or other tort, when the name of the wrong doer is not known, nor can be discovered after reasonable diligence, perhaps a bill to perpetuate the testimony of witnesses as to the right and injury, might be sustained. (*h*)

In cases also of *Contract*, difficulties frequently arise as to the parties liable to be sued. In these cases of contracts, as well as torts, it is advisable to address a courteous letter to the party supposed to be liable, stating the right and injury, or cause of action, and requesting him either to make compensation, or if he decline so doing, then at least to disclose whether he and what others, requesting him to name them, were concerned in the injury, and intimating that in case he should decline explicit communication, then it will become necessary to file a bill of discovery; and that if, for want of candour, that proceeding should be rendered necessary, the costs thereof may fall on him. (*i*) And in case of his refusal or neglect, in some cases, it may be advisable to file such bill for discovery; and it should seem, on general principles, that unless the answer would take the case out of the Statute of Limitations, (*k*) or would subject the party to a criminal proceeding, or to a penalty or forfeiture, (*l*) he would be bound to answer, notwithstanding he might thereby sustain some *pecuniary loss*, or otherwise prejudice his private interests; (*m*) and a bill even for the discovery of usury or other illegality is sustainable after the time for prosecuting for any penalty has expired; (*n*) and the same rule prevails at law whenever the time for suing for a penalty has expired. (*o*)

It has been expressly decided that a landlord may, by bill for a discovery, compel his tenant to disclose whether he has assigned a lease to an assignee, and to whom, in order to enable such landlord to sue the latter; though if the lease should contain any clause of forfeiture in case of assignment, it would be otherwise, unless the forfeiture be expressly waived; (*p*) and such a bill may also be filed against the *original lessee*, to ascer-

(*h*) See *Moodley v. Moreton*, 1 Mad. Ch. R. 192; 1 Bro. C. C. 470; 2 Dick. 34.

(*i*) *Ante*, vol. i. 438, 9.

(*k*) *Mac Gregor v. East India Company*, 2 Simon's Rep. 452. In that case, unless the bill charged a written acknowledgment within six years, it would be demurrable, *Id. ibid.*

(*l*) *Fleming v. St. John*, 2 Simon's R. 181.

(*m*) 46 Geo. 3, c. 37; 3 & 4 W. 4,

c. 42, s. 26. See *Cox and others*, 10 East, 399. See the cases when or not a defendant is bound to discover, 1 Madd. Ch. Prac. 214, *post*, 50, 51.

(*n*) *Talbot v. Smith*, 1 Ridgw. L. & L. 360; *Williams v. Farrington*, 3 Bro. C. C. 38; 2 Cox, 202; Chit. Eq. Dig. 664.

(*o*) *Roberts v. Allatt*, Mood. & Malk. 192.

(*p*) *Tothill*, 71; 1 Ves. 56; 1 Eq. Cas. Abr. 77; 1 Mad. Ch. Pr. 203.

CHAP. II.
PROCEEDINGS
BETWEEN, &c.

tain whether an old lease has not expired, (q) though it is said that as an *assignee* of a lease is a purchaser, *he* might demur to such a bill against himself. (r)

Even a bill lies against a lessee and an equitable mortgagee by deposit of a lease, to compel the former to execute, and the latter to accept an assignment, so that the lessor might safely sue him at law, on the principle *qui sentit commodum sentire debet et onus*; (s) though this would in general be unnecessary, if such equitable mortgagee has taken possession, in which case he would be estopped from insisting that he is not assignee, unless he could prove that in truth he was merely an *under lessee*. (t)

As respects the right to obtain a *discovery* of parties to be made defendants in an action, or of other facts, the general rule seems to be, that where the discovery is *immaterial*, (u) or where on the face of the bill, it appears there can be *no remedy*, a discovery would be merely impertinent, and would not be enforced. (v) But that where the bill avers that an action *is brought*, or where the necessary effect in law of the case stated by the bill, appears to be, that the plaintiff *has a right to bring an action*, (w) he is entitled to a discovery to aid that action so alleged to be brought, or which he appears to have *a right and an intention to bring*; (x) and it is not necessary that an action should have been brought *previous* to a bill of discovery, in support of an action, (y) though it was in one case said, that a bill of discovery does not lie to create evidence for a *future* cause. (z) But it has never been laid down, that a person can file a bill, not venturing to state who are the persons *against* whom the action is to be brought, nor stating such circumstances as may enable the Court to judge upon the right to sue, but must state the circumstances, and aver that he has a right to an action against *certain named defendants or some of them*. (a) Upon these principles a demurrer was allowed to a bill, which did not allege with sufficient certainty, *by whom* the duties claimed by

(q) Tothill, 69; 8 Vin. Abr. 539; 1 Madd. Ch. Pr. 203.

(r) 8 Vin. Abr. 550; Fonbl. Treat. on Equity, 2 Vol. 488; 1 Madd. Ch. Pr. 203, *sed quære*.

(s) *Lucas v. Comerford*, 3 Bro. C. C. 166; 1 Ves. 235, S. C. *ante*, 1 Part, 319, 320.

(t) Peake's Law Evidence, tit. Covenant.

(u) Redesd. Tr. Pl. 155, 6, 3d edit., and cases there mentioned, and 1 Madd. Ch. Prac. 198.

(v) See *Rondeau v. Wyatt*, 3 Bro. C. C. 154; Finch. 36, 44; Redesd. Tr. Pl. 15; 1 Mad. Ch. Pr. 198.

(w) *Moodaly v. Moreton and East India Company*, 2 Dick. 34; S. C. 1 Bro. C. C. 468; 1 Mad. Ch. Pr. 198.

(x) *French v. Finch*, 2 Ves. 294; but see note (w), *supra*, and 1 Mad. Ch. Pr. 198, 9, *contra*.

(y) *Id. ibid.*

(z) *Id. ibid.*

(a) *Mayor and Citizens of London v. Levy*, 8 Ves. 404.

the city of London under letters patent, in respect of which a discovery was prayed in aid of an action were payable; (b) though, if the bill had stated that by reason of combination, it was so managed that the plaintiff could not bring an action, and therefore there ought to be an account of the fees in a Court of *Equity*, such bill might have been sustained. (c)

Formerly, in cases even of *trespass* no inconvenience resulted to the plaintiff from his unreasonably including too many persons as joint trespassers in an action, for the acquitted defendants had no remedy for their costs; and thence it became the practice perhaps, without any pretence whatever, to proceed jointly against all who might by any probability have been present, and even so as thereby unjustly to endeavour to exclude any adverse testimony. But this injustice, as regarded actions of *trespass*, was in a degree put an end to by the statute 8 & 9 W. 3, c. 11, which gives acquitted defendants their costs, unless the Judge shall certify that there was reasonable ground for joining them as defendants. (d) But as this act extended only to actions of *trespass*, and it had become a practice to include any number of defendants in actions of *trover*, or on the case, and in *replevin*, and against executors, (e) the same provision was by the recent Law Amendment Act extended to *all personal actions*. (f) Since this enactment it is certainly the duty of an attorney to ascertain who are the precise parties whom it is at least reasonable to include in the action.

In cases of *contracts*, until the recent act, a claimant incurred the risk of including too many or too few parties as defendants. In general, even at the present day, if he in his *first* action include *too many*, on their own supposed contract, the objection will, on the trial, be ground of nonsuit, and entire failure in that action. (g) If on the other hand he joined *too few*, then any one of the defendants actually sued might plead, in abatement, the *non-joinder* of an omitted party; and, if such plea were true, the plaintiff was compelled to begin *de novo*, and if the omitted party were out of the realm, the plaintiff must have proceeded by special original and outlaw the absent party (though irregularly

(b) *Id. ibid* 8 Ves. 398.

(c) *Ibid.* 8 Ves. 405; 1 Mad. Ch. Pr. 199.

(d) 8 & 9 W. 3, c. 11, s. 1.; see cases Tidd. 9th edit. 986.

(e) 3 & 4 W. 4, c. 42, s. 32; see former cases, Tidd. 9th edit. 986.

(f) Section 32, enacts, That where several persons shall be made defendants in any personal action, and any one or more of them shall have a *nolle prosequi*

entered as to him or them, or upon the trial of such action, shall have a *verdict* pass for him or them, every such person shall have judgment for and recover his reasonable costs, unless in the case of a trial the judge before whom such cause shall be tried shall certify upon the record, under his hand, that there was a *reasonable cause* for making such person a defendant in such action.

(g) 1 East Rep. 52.

CHAP. II.
PROCEEDINGS
BETWEEN, &c.

so, (g) before he could proceed with effect against the defendants in England, and in which proceedings to outlawry there was considerable risk of irregularity. (h) To remedy this defect in the law, a most important new provision was introduced in the recent act for the amendment of the law, which in effect puts an end to pleas in abatement when the omitted party is *out of the kingdom*, by requiring a party pleading nonjoinder in abatement, to aver in the plea that the party omitted was, and is, *resident* within the jurisdiction of the Court; and to state and verify in his affidavit, the place of residence of such person with convenient certainty. (i) Since this act no plea in abatement for nonjoinder can be effectual when the omitted party resides out of the kingdom, and if he reside here and the plea be true, the plaintiff may immediately enter a *cassetur* and begin *de novo* against all the proper parties; and in such *second* action he is to have a verdict against such persons as he shall prove to be liable, although he fail as to the rest. (j)

Thirdly, what the cause or ground of action, and how to be ascertained.

Thirdly, it will next be the duty of the complainant's attorney, well to ascertain the *precise cause of action* being the right and injury, whether independent of contract or founded on contract. The particulars of these may be ascertained by any means short of the breach of personal confidence. If they cannot be obtained by civil means without legal measures, then a bill for a discovery may in most cases be filed; as to compel a defendant to admit or deny whether he did not promise marriage to the complainant, and so as to enable her to sustain an action for the breach; (k) or whether he did not by some memorandum in writing, signed by him, within six years, effectually take the case out of the Statute of Limitations; (l) so a bill lies for the discovery of assets, to enable the plaintiff to bring an action at law against an executor or administrator; though in this case, the bill must charge, that assets or goods of the testator have come to his hands; (m) or the creditor or legatee, or next of kin, may cite and compel such personal representatives to exhibit a

(g) *Bryan v. Wagstaff*, 5 Bar. & Cres. 314.

(h) Tidd. 9th edit. 128.

(i) 3 & 4 W. 4, c. 42, s. 8, enacts, "That no plea in abatement for the nonjoinder of any person as a co-defendant shall be allowed in any Court of Common Law, unless it shall be stated in such plea that such person is resident within the jurisdiction of the Court, and unless the place of residence of such person shall be stated with convenient certainty in an affidavit verifying such plea." And sec-

tion 9, enacts, "That to any plea in abatement in any Court of Law, of the nonjoinder of another person, the plaintiff may reply that such person has been discharged by *bankruptcy* and *certificate*, or under an act for the Relief of Insolvent Debtors."

(j) 3 & 4 W. 4, c. 42, s. 10.

(k) Forrester's Rep. 42.

(l) *Cock v. Wilcock*, 5 Mad. Rep. 331; *Mac Gregor, v. East India Company*, 2 Simons, R. 454.

(m) 1 Ch. Cas. 226; 1 Madd. Ch. Pr. 207.

declaration, or inventory, or account of assets and expenditure, in the Ecclesiastical Court; (n) and in cases within its proper jurisdiction, that Court has power to compel a discovery as well as a Court of Equity. (o)

It is said, however, that a bill does not lie in equity to discover whether a particular person exists, or where he is, so as to enable the plaintiff to make him a party to a bill; but the authorities do not agree upon that point. (p)

The statute 6 Ann, c. 18, enables persons having an estate in remainder, reversion, or expectancy, after the death of any person, upon affidavit of his belief of the death of such person and the concealment thereof, once a year to move the Lord Chancellor for his order to produce such person or persons, not exceeding two; and if the production be refused, and no sufficient evidence of the continuance of the life be established by affidavit, the person so concealed is to be taken to be dead, and the person entitled in remainder, &c. may enter upon the estate. (q) A personal annuity payable during the lives of several named persons, would not be within this act; and therefore it would be well for a grantor of an annuity to stipulate in the deed for the production, from time to time, of sufficient evidence of the continuance of the lives, in order to avoid the necessity for filing a bill of discovery; and which, it is apprehended, he might effectually do. (r)

We have suggested the expediency of ascertaining the evidence in the first instance, before even giving any intimation to the opponent of intended litigation (s); and we have seen, that it is the duty of an attorney to ascertain, at least, that there will be sufficient evidence to sustain the proceeding *before he commences it*; (t) and, if he should proceed to trial without seeming adequate evidence, and the plaintiff be nonsuited, he would be liable to an action for such negligence. (u) Too frequently proceedings are commenced merely upon the client's statement; but the safest course is, in the first instance, to examine, at least, *the principal witness*, so as to ascertain that probably the client may safely proceed, especially as the evidence may affect even *the form of action*, or the pleadings; or at least, the attorney should secure proof that he has suggested

Fourthly, what is the evidence, and how it is to be ascertained.

(n) *Ante*, 1 Vol. 517, tit. Executors.

(o) *Dun v. Coles*, 1 Atk. 289, and other cases, 1 Mad. Ch. Pr. 208.

(p) *Chancey v. Tahourdin*, 2 Atk. 393, accord; but see 1 Vern. 93, cited Redesd. Tr. Pl. 227, *contra*, cited 1 Mad. Ch. Pr. 209.

(q) 6 Ann, c. 18, ss. 1, 2, 3, and 4; see *Vincent v. Fernandez*, 1 P. Wms. 524; 2 Mad. Ch. Pr. 716.

(r) *Semble*, 1 Madd. Ch. Pr. 206.

(s) *Ante*, Vol. 1. p. 440 and 510.

(t) *Ante*, 21, 2.

(u) 4 Bar. & Ald. 202.

CHAP. II.
PROCEEDINGS.
BETWEEN, &c.

to his client the expediency of an immediate examination of the evidence, and that such client has, to avoid expense, or on some other account, expressly dispensed with it. If the evidence be in any respect doubtful, then after a proper written application to the defendant, a *bill for a discovery* may be filed against him; or if the death of one or more material witnesses should be apprehended, we have seen some instances when it may be proper to file a bill to perpetuate the testimony. (v) We have seen, that it rarely occurs that an answer to a bill will contain so unqualified an admission as to enable a plaintiff to use it in proof of his case at law; but still there are cases in which it will be expedient to endeavour to obtain some admission by the defendant. (w)

Fifthly, bills for discovery, and costs thereof.

Fifthly, the full consideration of bills for discovery more properly belongs to the *fourth* part, relating to Suits in Equity; (x) but we will, nevertheless, here notice the principal points in connection with proceedings at law. Upon a bill, praying nothing but a discovery (and not also relief), it has been held, that the *plaintiff* shall not have his costs, and even that the *defendant* is entitled to *his costs*, and those even as between attorney and client. (y) It is presumed that this rule has prevailed upon the supposed principle, that it was originally the *plaintiff's own fault* not to secure evidence, and that, therefore, he ought to pay the costs of any trouble he may afterwards occasion the defendant by requiring him to communicate such evidence. Where there was no privity between the parties, that reason may, perhaps, be just; but certainly not so where there has been any privity, and an implied duty or contract at all reasonable times to disclose the requisite information, as in the case of agents. (z) Mr. J. Buller thought, the rule thus laid down was *too general*; and was of opinion that if the plaintiff is entitled to the discovery, and goes first to the defendant to ask for the accounts to which he has in justice a right, especially if he goes in such a civil manner as men ought to observe

(v) *Ante*, 1 Vol. 733; 2 Madd. Ch. Pr. 250, 1; but note that the suit at law must have been *previously* commenced, to sustain a bill to perpetuate; *id. ibid.*; so that, in strictness, this suggestion should be introduced in a subsequent chapter.

(w) *Ante*, 1 Vol. 440.

(x) See in general 1 Madd. Ch. Pr. 196 to 218; and Chitty's Eq. Dig. tit. Pleading, Answer 3, 4, 5, page 756 to 764, and 778 to 780; *id.* 889; and *id.* title *Practice, Costs*, p. 929.

(y) *Simmonds v. Lord Kinnauld*, 4 Ves. 476; *Cartwright v. Haloly*, 1 Ves. j. 293; *Noble v. Garland*, 1 Madd. Rep. 344; *Hewart v. Semple*, 5 Ves. 86; Redcs. Tr. Pl. 164.

(z) *Semble*; When a defendant has *previously covenanted* to discover, and to answer any bill of discovery, he is compellable to discover, although it might endanger his pecuniary or other interests; 1 Strange, 168; and 1 Madd. Ch. Pr. 215, note (m).

in asking for their rights; then if the defendant refuse, and the plaintiff is thereby compelled to file a bill for a discovery, he (the *defendant*) ought not to have his costs; though when a bill is precipitately filed, it may be just that the plaintiff should pay them. (a) In a case at law, the counsel complained of the hardship of a plaintiff in equity being obliged to pay the costs of a discovery; upon which Lord Kenyon observed, that he had once heard Lord Mansfield say, he thought in such a case, the court of law ought to allow the costs paid by the plaintiff to the defendant in equity as costs at law; and that he was struck with the propriety of the observation, and thought it would be a good rule to be observed. (b)

Sixthly, it is essential, when the claim of a client is founded on some *written security*, to ascertain first whether it is sufficient in its terms; and, secondly, whether it is properly stamped; for if it has been framed contrary to the understanding of the parties, as a joint security, when one joint and several was intended, or otherwise, it will be necessary, before any proceedings at law thereon, which might be considered an adoption of the security, to make a formal application to the other party for a correct contract, signed by him and all the other parties; and if refused, then a bill to enforce the delivery may be necessary; (c) and where there was an express agreement to give a valid note, and the party gave one on an improper stamp, a court of equity would enforce the delivery of a valid note, (d) though it has been supposed that in general a court of equity cannot relieve against a defect in the stamp, as the parties acted illegally in accepting a security not properly stamped. (e) If there were a valid agreement sufficient at law, then indeed the party, after requiring the delivery of a proper security, might sue at law separately for not giving it, and thereby avoid the necessity for any proceeding in equity. In one case, under particular circumstances, where it was the duty of the *defendant* to have got an agreement stamped within twenty-one days, but he neglected to do so, in conse-

Sixthly, demand of a legal security, in lieu of one defective.

(a) *Weymouth v. Boyer*, 1 Ves. j. 416; and 1 Madd. Ch. Pr. 217, note (y), where that author states he had heard Lord Eldon approve that doctrine; and why ought not a *plaintiff* to receive costs where a defendant has unnecessarily compelled him to file a bill, the same as in case of an interpleader bill; 1 Madd. Ch. Pr. 181; *Altridge v. Mesuer*, 6 Ves. 419. If even a trustee refuse to join in a conveyance, he may be decreed to pay all the costs of a bill for specific performance thereby rendered necessary; *Jones v. Lewis*, 1 Cox, 199; 2

Madd. Ch. Pr. 552.

(b) *Grant v. Jackson*, Peake Rep. 203; but without a *contract* express or implied, to communicate the matter discovered, and a special count for not making the communication, and stating the consequent necessity to file the bill and incur the costs, the latter could not be recovered at law.

(c) *Ante*, 1 Vol. 710, 711, 859, 860; *Rawstone v. Parr*, 3 Russ. 424, 529; *Crosby v. Middleton*, Prec. Chan. 309.

(d) *Aylett v. Bennett*, 1 Anstr. 45.

(e) *Ante*, 710.

CHAP. II.
PROCEEDINGS
BETWEEN, &c.

quence of which omission the plaintiff was obliged to pay the duty and 5*l.* penalty, the Judge permitted the plaintiff to recover the amount as damages. (*f*) In general, when an instrument (excepting a bill of exchange, promissory note, or receipt) has not been duly stamped, it suffices to get the proper duty impressed at any time before the trial at law or in equity; (*g*) and it will be better to delay that expense until it has become absolutely necessary, as it may, perhaps, be prevented by compromise or by admission of a copy of the document to be read in evidence, or sometimes by a Judge's order. (*h*)

Seventhly, propriety of attorney's writing a letter to the intended defendant before any proceedings, and of making a proper demand.

Terms of such letter.

As attornies and solicitors should never allow themselves to be contaminated by the angry feelings of their clients, or their quarrels *inter se*, so it is essential that they should conduct all stages of the suit with all possible courtesy towards the opponent, and write a civil letter to him in sufficient time before any proceedings be commenced, so as to enable him to prevent expense; unless, indeed, it be expected that he will abscond to avoid arrest, or keep out of the way to avoid the service of process, in which cases only the omission of a previous letter can be excused. The omission of such a letter generally excites angry feelings towards the attorney as well as the plaintiff, and induces the party afterwards to take advantage of any trifling error, which he would otherwise be ashamed of even noticing. Formerly, on taxing costs, no charge for such a letter was allowed to an attorney for the plaintiff against the defendant; but the propriety of encouraging this preliminary step has of late induced a contrary practice. (*i*) The letter need only state, "that the attorney has been instructed by A. B. to commence proceedings against the party for £—— [or whatever may be the subject of the intended suit], and that unless the same is paid before a named day (allowing sufficient time to raise the money), the expense of proceedings will be incurred without further notice." If the plaintiff's claim would

(*f*) Esp. Rep. But that decision must not be brought into precedent.— See case of a motion against an attorney on account of an insufficient stamp. 2 Smith. Rep. 155, 6.

(*g*) Chitty's Stamp Acts; where see the excepted cases, and *Middleton v. Briscoe*, 11 Ves. 395.

(*h*) *Semble*, under 3 & 4 W. 4, c. 42, s. 15.

(*i*) On a trial before Sir J. Mansfield, of an action between an attorney and his client, an arbitration was proposed, but in consequence of some previous high words upon the subject of such a

letter having been written by such attorney without authority from his client, and his therefore refusing to pay it, the attorney refused to refer the cause, unless the charge of 3*s.* 6*d.* for writing such letter was at all events paid; and the cause being in consequence about to proceed, Sir J. Mansfield declared that he thought the charge legal and reasonable, and ought to be paid, and actually paid the 3*s.* 6*d.* in Court out of his own pocket, in order that the cause might be so settled; but which the attorney immediately afterwards very properly returned to the judge's clerk.

by a proper demand under the recent Act 3 & 4 Wm. 4, c. 4, s. 28, entitle the plaintiff to *interest*, then, in addition to the usual language of the attorney's letter, *a demand of interest*, in the subscribed form, should be added. (*f*) At law it is not material that the demand should be of the precise sum; for if the plaintiff demand too much, the defendant must, nevertheless, tender or pay into Court a sum to cover what is really due, and pay costs to the time of such payment; but in *equity*, it is important that the demand, or at least the suit, be not for too large a sum; for if the claim, as in a tithe suit, be larger than the plaintiff can support, the Court will give costs against him for the excess, up to the time of his giving notice of abandoning any part of the excessive demand made by the bill. (*k*)

CHAP. II.
PROCEEDINGS
BETWEEN, &c.

We have in a preceding page observed upon the propriety and mode of asking for or proposing an apology. (*l*) Many causes of action and claims may with propriety be brought forward principally, if not entirely, with a view to clear up character, (*l*) or obtain explanation, or prevent the repetition of affront or small injury; and no sensible party would willingly continue a suit which may rather amuse the public than obtain any substantial compensation. Hence it is the peculiar duty of an attorney in such cases to afford opportunities for apology, though it might be injudicious absolutely to ask it at the risk of contemptuous rejection. On the other hand, no gentleman or liberal minded man ought to require too humiliating an apology, which would reduce even the value and utility of the explanation; and if rejected on that ground, the very circumstance of the parties having insisted upon it, would probably reduce the damages to the smallest coin. (*m*).

Eightly, of
proposals for
an apology or
a compromise.

(*j*) And I do further, for and on behalf of the said *A. B.*, and by his directions and without prejudice to any prior demand or right to recover any antecedent interest, hereby according to the recent statute in that behalf, give you notice that the said *A. B.* doth and will claim interest on the said debt and sum of ————*l.* from the date of this demand, and until the term and time of actual payment of the said debt; and I do hereby, as such attorney as aforesaid, demand and require of you to pay such interest accordingly. Dated, &c.

Yours, &c.

E. F., attorney for the plaintiff.

To Mr. ———.

(*k*) *Woolley v. Brownhill*, 13 Price, 500; 1 M'Clel. 317, S. C.

(*l*) *Ante*, 1 Vol. 562, 3.

(*m*) In a recent case, a collector of

poor rates had by mistake levied for rates which had already been paid; and he wrote a letter explaining the circumstances, and regretting the mistake, offering compensation, and concluding as follows, and which letter materially influenced the judge and jury in his favor, and against the plaintiff, who had taken no notice of such letter.

"I can only repeat that I am exceedingly sorry for any trouble or inconvenience the error may have put you to; we are none of us infallible; and as there was nothing personal intended on my part, I trust you will see the propriety of not making it so on yours, as I took the earliest opportunity I could of rectifying it. I am, Sir, your obedient servant, *C. D.*"
"To Mr. *A. B.*"

Form of a written demand of interest pursuant to 3 & 4 W. 4. c. 42. s. 28, to be added in the attorney's letter, demanding payment of a debt.

Terms of an apology.

CHAP. II.
PROCEEDINGS
BETWEEN, &c.
Compromises.

As to *compromises*, they may be made and invited by the attornies on each side; and if made either impliedly, and still more if expressly, without prejudice, they cannot be taken advantage of injuriously by either party. We have seen how *bonâ fide* and fairly conducted must be all negotiations for a compromise. (n) The offer of a compromise should be liberal, fair, and adequate to the circumstances, and not so exceedingly trifling or concerted as to excite contempt; and therefore, in equity, where costs are in general discretionary, a defendant having endeavoured to get the plaintiffs to come to an agreement with him to take a very small sum of money in satisfaction of all his interest in an estate, the Court, principally on account of such offer, made him pay the costs of the suit. (o)

On the other hand, there is a rule in equity important as regards the refusal of an offer of accommodation, namely, that if a plaintiff should be absurd enough to refuse a fair offer of accommodation, and obstinately persist in his suit, it is considered as an aggravation, and the bill if dismissed will be so with costs, although it might have been otherwise if no such accommodation had been offered or rejected. (p)

We have seen when or not a claim connected with a *criminal* charge may be *compromised*. (q) It has been lately decided, that a promissory note given by a defendant in prison after conviction for a misdemeanour, and before sentence, in pursuance of a recommendation of the Court to compromise, is valid, although the Court was not apprised of the *terms* of the compromise, and although the costs of the prosecution were included in the note. (r)

As regards compromises where there are *several* claimants and opponents, it is, at least at law, considered that all must concur, or the suit must proceed. But a different doctrine was recently, at least, established in equity in one case, where certain parties to a suit beneficially interested in the subject matter desired to compromise it, but other parties in the same interest, not insane, nor under age, objected; and the Vice-Chancellor, after referring it to one of the Masters, and receiving his report that the compromise was prudent and expedient, confirmed the compromise by his order, and the Chancellor on appeal refused to

(n) *Ante*, 23, 4.

(o) *Avery v. Osborne*, Burr. 349;
2 Chit. Eq. Dig. 911.

(p) *Big v. Grubb*, 2 Atk. 48; 2 Mad.

Ch. Pr. 549.

(q) *Ante*, 1 Vol. 17.

(r) *Kirk v. Strickwood*, 1 Nev. & Man. 275.

disturb such order. (s) So when shipowners (t) or partners (u) disagree, a court of equity can effect any just arrangement assented to by the majority. Indeed, the majority of partners or tenants in common may, in general, effect any just arrangement at law.

Perhaps no circumstance is of more frequent occurrence, than the defendant's requesting time on his giving security, and which may be either real or personal, or collateral. Here the attorney for the plaintiff is bound immediately to communicate the offer to his client, and suggest the expediency of due inquiry into the sufficiency of the security, as well in fact as in law; and if such inquiry would be attended with any expense, should require an express written agreement from the defendant to pay the same. (v) If a part payment from one of several debtors be proposed, upon his being released, such terms may be safely accepted, provided there be no instrument executed that would operate as a release to the other debtors, nor prejudice the claim on a party who is substantially only a surety; the former may be effected by a short deed reciting the part payment, and the plaintiffs *covenanting* not to sue the party paying, except for conformity. (w) If indulgence or time is to be given to a principal debtor, care must be observed to obtain the express signed engagement of *every surety*, that the giving such indulgence shall not prejudice the claim upon him at the enlarged time; or in case of his death, even in the mean time. If the collateral security of a third person is to be taken, then care must be observed that it be either framed expressing the consideration, and otherwise so as to avoid any objection under the statute against frauds; (x) or that it be by a legal bill of exchange, (y) or, which would be safer, by express covenant under seal. (z) In all cases where there are to be several contracting parties, care should be observed that the covenants be *several* as well as joint, so as to secure a remedy *at law* against the assets of any party who may die, (a) and even to require a stipulation that suits may be brought against all jointly, or each separately; or even against

Ninthly, proposals for time, and what security to be required or accepted.

(s) *Brazier v. Hudson*, Sittings in Lincoln's Inn, 20th August, 1833, reported in the Legal Observer of 28 Sept. 1833, page 409.

(t) *Ante*, 1 Vol. 717, 8.

(u) *Ibid.* 850, 1.

(v) See the reason, equally here applicable, *ante*, 1 Vol. 300, 1.

(w) See *Dean v. Newhall*, 8 Term Rep. 168; and see the form of the deed

settled by Mr. Preston, and by the author, 4 Chitty's Commercial Law, 356.

(x) 29 Car. 2, c. 3, s. 4, *ante* 1 Vol. 126, 7.

(y) *Ridout v. Bristow*, 1 Tyr. R. 84; 1 Crompt. & J. 231. S. C.

(z) *Ante*, 1 Vol. 823.

(a) *Ante*, 1 Vol. 121; *Rawstone v. Parr*, 3 Russ. R. 424.

CHAP. II.
PROCEEDINGS
BETWEEN, &c.

any two or more, where the parties are numerous. (b) If a deposit of goods is to be made by way of mortgage or *lien*, care should be observed to stipulate for a power of sale. (c)

In the next place, if a *warrant of attorney* or *cognovit* be offered, reference must be had to the provisions in the *Bankrupt* (d) and *Insolvent* Acts, (e) which in certain cases defeat the benefit of those securities, especially the former.

In case of *general insolvency*, or inability to pay *all* debts in full, or at all *promptly*, at the appointed times, to avoid a fiat in bankruptcy, deeds of *inspection* or of *composition*, or *letters of license*, are frequently proposed and accepted. These are arrangements requiring a distinct consideration. (f) We shall here merely observe, that in order effectually to protect the property assigned to trustees and creditors, the signatures of one or more of the creditors should be immediately obtained. (g) The statement of the whole of the official duties of a solicitor on these occasions, would be in effect a repetition of all the steps to be taken, considered in the previous volume.

Tenthly, of notices, tenders, and demands, on part of plaintiff, of different descriptions.

If the wrong-doer should neglect to pay, or make satisfaction, pursuant to the attorney's request, then before the commencement of any proceedings, it will be essential to consider whether it is necessary or advisable to serve upon him any *formal written demand*, whether of goods, (h) or of an account, (i) or of performance, (j) or the production of a supposed justice's warrant and copy thereof, or other authority, under color of which the wrong-doer may have acted. If the slightest doubt should exist upon the necessity for either of those measures, or of the evidence of their having been adopted, each should be *repeated*, and this even in the presence of *two* witnesses, to avoid the risk of the death of one. One further caution is here *also* to be observed, *viz.*, to keep *duplicates* of all notices and proceedings, so that each part be a *duplicate* of the other, and in effect an original; and also to avoid the multiplication of witnesses, so that the *same* witness who has written the original, or the duplicate, or copy, and examined the same, shall himself deliver it to the party to

Precaution in mode of giving notice in general.

(b) *Scmble*, the latter stipulation would enable a plaintiff to sue accordingly.

(c) *Ante*, 1 Vol. 491, 2.

(d) 6 G. 4, c. 16, s. 108; 1 W. 4, Sess. 1, o. 7, s. 7; *Godson v. Sanctuary*, 1 Nev. & Man. 52.

(e) 7 G. 4, c. 57, s. 32; *Sharpe v. Thomas*, 6 Bing. 416; *Herbert v. Wilcox*, id. 203; *Godson v. Sanctuary*, 1 Nev. & Man. 52; *Wray v. Egremont*, 4 Bar. &

Adol. 122.

(f) See *Montague on Composition*; and fully, 3 *Chitty's Commercial Law*, 687 to 721; *Chitty on Bills*, 8th ed. 96, 7, 8, 606, 803.

(g) *Small v. Marwood*, 9 Bar. & Cres. 300; *Crewe v. Dicken*, 4 Ves. j. 97, *ante*, 1 Vol. 303.

(h) *Ante*, 1 Vol. 566, 497, 498.

(i) *Ante*, 1 Vol. 497.

(j) 1 Vol. 496, 498.

whom it is addressed, or himself put the same in the proper post office, without any intervening third person. (l)

CHAP. II.
PROCEEDINGS
BETWEEN, &c.

Whenever a party has committed a trespass, or other injury *“in obedience to”* (that is, *strictly* according to the *directions* of a justice’s warrant, and not exceeding what was thereby expressly or impliedly directed to be done), it becomes necessary to *demand a perusal of the warrant*, and of a copy thereof; and if the request should be complied with within six days, then if it should appear that the officer acted strictly according to the justice’s authority, he is protected in such his obedience, and he must not be sued; and, in that case, if the magistrate acted illegally in issuing such warrant, *he* should be served with a calendar month’s notice of action; (m) and after the expiration thereof, and within six calendar months after the injury was committed, he should be *sued*. But if the magistrate had jurisdiction, and himself acted *regularly*, but some *third person maliciously* caused him to issue the warrant when there was no just ground for the same, as maliciously obtaining a search warrant, then the action can only be sustained against such *third person*. The necessity for demanding an inspection of the supposed warrant, depends on the *General Act*, 24 Geo. 2, c. 44.

Eleventhly, demand of perusal and copy of justice’s warrant.

The 6th section enacts, “That no action shall be brought
“against any constable, headborough, or other officer, or against
“any person or persons acting by his order, and in his aid, for
“any thing *done in obedience to any warrant*, under the hand
“or seal of any Justice of the Peace, until demand hath been
“made, or left at the usual place of his abode, by the party or
“parties intending to bring such action, or by his, her, or their
“attorney or agent in writing, signed by the party demanding
“the same, *of the perusal and copy of such warrant*, and the
“same hath been refused and neglected for the space of six days
“after such demand; and in case after such demand, and compliance therewith, by shewing the said warrant to, and permitting a copy to be taken thereof by the party demanding
“the same, any action shall be brought against such constable, headborough, or other officer, or against such person or persons acting in his aid, for any such cause as aforesaid, without making the Justice or Justices who signed or sealed the said warrant defendant or defendants, that on producing or proving
“such warrant at the trial of such action, the jury shall give

(l) *Toosey v. Williams*, Mood. & M. 129; and *Hetherington v. Kemp*, 4 Campb. 193.

(m) See *post*, 63, 4.

CHAP. II.
PROCEEDINGS
BETWEEN, &c.

“ their verdict for the defendant or defendants, notwithstanding
 “ any defect of jurisdiction in such Justice or Justices; and if
 “ such action be brought jointly against such Justice or Justices,
 “ and also against such constable, headborough, or other officer,
 “ or person or persons acting in his or their aid as aforesaid, then
 “ on proof of such warrant, the jury shall find for such constable,
 “ headborough, or other officer, and for such person and persons
 “ so acting as aforesaid, notwithstanding such defect of jurisdic-
 “ tion as aforesaid: and if the verdict shall be given against the
 “ Justice or Justices, that in such case the plaintiff or plaintiffs
 “ shall recover his, her, or their costs against him or them, to be
 “ taxed in such manner by the proper officer as to include such
 “ costs as such plaintiff or plaintiffs are liable to pay to such
 “ defendant or defendants for whom such verdict shall be found
 “ as aforesaid.” (n)

Section 7th provides, “ That where the plaintiff in any such
 “ action against any Justice of the Peace shall obtain a verdict,
 “ in case the Judge before whom the cause shall be tried shall
 “ in open Court certify on the back of the record, that the in-
 “ jury for which such action was brought was wilfully and
 “ maliciously committed, the plaintiff shall be entitled to have
 “ and receive *double* costs of suit.”

Section 8th provides, “ That no action shall be brought against
 “ any *Justice* of the Peace for any thing done in the execution
 “ of his office, or against any constable, headborough, or other
 “ officer or person *acting as aforesaid*, unless commenced within
 “ six calendar months after the act committed.” (o)

Upon the 6th section, requiring the demand of a copy of the
 warrant, it has been recently decided that a plaintiff is not bound
 to demand a copy of a warrant before commencing his action, in
 any case where a constable, overseer, or other party, has not
 acted *strictly in obedience* to the warrant; nor in any case where
 the justice who issued the same could not be sued; for the
 object of the statute in making a demand of the warrant neces-

Form of de-
mand on a con-
stable of the
perusal and
copy of war-
rant.

(n) The form of the demand of the
perusal of a warrant is thus:

Sir,—I do hereby, as the attorney (or
“agent” according to the fact) of and
for *A. B.* of, &c. according to the form
of the statute in such case made and
provided, demand of you the perusal and
copy of the warrant, by virtue or under
colour whereof you did, on or about the
— day of — last, imprison the
said *A. B.*, and carry and convey him in
custody to and before *G. H.*, Esquire,
one of his Majesty’s justices of the

peace in and for the county of —, [or
seize, take, and carry away certain
goods and chattels, to wit, &c. (naming
the quantities and description of each)
of the said *A. B.*, of great value, to wit,
of the value of —*l.*, and did convert
and dispose thereof to your own use].
Dated, &c. — day of —, A.D. —,
E. F., &c.

To Mr. *C. D.*

(o) As to the construction of this
section, *ante*, 1 Vol. 772 to 775.

sary, was that the justice might be properly joined or made a defendant. (o) Hence, therefore, in all cases when it is certain that a wrong-doer has exceeded any authority that was given to him by the terms of a warrant; as if under a warrant to take the goods of *B.*, or certain described goods, he has taken the goods of *A.*, or goods of a different description; or has broken open an outer door, which the warrant did not authorize; or has taken an excessive distress; or has been guilty of any excessive force or other irregularity; then the party injured may and ought, without delay, to proceed only against the immediate wrong-doer, for the excess, unless indeed the issuing the warrant itself was clearly illegal; in which case it might be preferable to proceed against the magistrate or the party maliciously causing the warrant to be issued: the choice of which remedies must greatly depend upon the circumstances of each particular case, and should materially be governed by the answer to the question,—which proceeding will probably be most productive.

It is well known, that Justices of the Peace, (*p*) and revenue officers, whether of the Customs or Excise, (*q*) and many other either general or local officers and persons are powerfully protected by several regulations; (*p*) as first, that requiring a certain *notice of action* to be duly served, in general a *calendar month* before its commencement; *Secondly*, enabling each to *tender amends* before action; *Thirdly*, enabling each to *pay into Court* a sum sufficient to cover the damages, when he has neglected to *tender* in due time; *Fourthly*, requiring the action to be commenced within a short limited time after the injury; as against Justices, *six calendar months*; and against custom and excise officers, even *three lunar months*; *Fifthly*, rendering it essential that the *venue* be laid in the proper county where the injury was committed; *Sixthly*, enabling the defendant to plead the *general issue* or the tender, and give special matter in evidence. We have already considered some of the constructions upon these acts. (*r*)

Twelfthly, when a *notice of action* must be served, and requisites thereof.

The principal statute, the construction of which is most frequently the subject of discussion, is 24 Geo. 2, c. 44, relating to *Justices of the Peace*, and Inferior Officers of Justice. It en-

Notices to *Justices* in particular.

(o) *Sturch v. Clarke*, 4 B. & Adol. 113; and as to the demand of a copy of the warrant in general, see *Kay v. Grover*, 7 Bing. 312, and Chitty's Col. Stat. tit. Justices.

(p) Justices, 24 G. 2. c. 44; Tidd. 9th edit. 28, 29, 30; Chitty's Coll.

Stat.; and see Constructions, *ante*, Vol. 1, 772 to 775.

(q) Customs and Excise, 28 Geo. 3, c. 37, s. 25; 6 Geo. 4, c. 108, s. 97; 7 & 8 Geo. 4, c. 53, s. 115; *ante*, 1 Vol. 772 to 775.

(r) *Ante*, 1 Vol. 771 to 775.

CHAP. II.
PROCEEDINGS
BETWEEN, &c.

acts, "That no writ shall be sued out against, nor any copy of
"any process, at the suit of a subject, shall be served on any
"Justice, for any thing by him *done in the execution of his office*,
"until *notice in writing* of such intended writ or process shall
"have been delivered to him or left at the usual place of his
"abode, by the attorney or agent for the party who intends to
"sue or cause the same to be sued out or served, at least *one*
"calendar month before the suing out or serving the same: in
"which notice shall be clearly and explicitly contained, the
"cause of action which such party hath or claimeth to have
"against such Justice; on the back of which notice shall be
"indorsed the name of such attorney or agent, together with
"the place of his abode, who shall be entitled to have the fee
"of 20s. for the preparing and serving such notice, and no
"more."

The 2d, 3d, 4th and 5th sections of the act, enable the Justice to tender amends and plead the same, and to plead the general issue, and give the special matter in evidence, and to pay a sum to cover damages into Court; and provide that the plaintiff shall not recover unless he prove the due service of a notice of action; and that no injury, not specified in the notice, shall be proceeded for. The 6th section relates to the demand of the copy of a Justice's warrant, and the joining him in an action. The 7th section subjects Justices to *double* costs, when the Judge who tried the cause shall certify that the injury was wilful and malicious; and the 8th section limits all actions against Justices, for what has been done by them in execution of their office, to six calendar months.

Decisions on
the statutes.
Who a Justice
within the act.

The constructions of this act establish, that a *person illegally acting as a Justice*, without legal qualification, and when sued for the penalty on that very account, *is not a Justice* within the meaning of the act, and consequently is not entitled to any notice. (s)

As respects the words "DONE IN THE EXECUTION OF HIS OFFICE," they do not apply to a Justice *illegally and knowingly* taking a fee for granting a license. (t) But it is established, that unless in the clearest and grossest cases of *wilful* misconduct, the words of the act are to be read as if they were "*bonâ fide under color, or supposed correct execution, of his office*;" for, as frequently observed, if the act had merely

(s) *Wright v. Horton*, Holt. C. N. P. 458.

(t) *Morgan v. Palmer*, 2 B. & C. 729; and see *Irving v. Wilson*, 4 T. R. 485;

Parsons v. Blundy, Wightw. 22; but if taken by mistake, see *Greenaway v. Hurd*, 4 T. R. 553; and see *Waterhouse v. Keen*, 4 B. & C. 200.

intended to protect magistrates when they *acted strictly* within the scope of their jurisdiction, then the words would be unnecessary, as the magistrate would not then require such protection. (u) He is therefore entitled to notice where he has acted upon a subject that arose locally beyond the limits of his jurisdiction; (v) or where a statute required the concurrence of *two* Justices, and *one* alone acted; (w) and where a lord of a manor was also a Justice, and seized a gun within his own manor, it will be presumed that he acted as Justice, so as to be entitled to a notice. (x)

As the statute requires notice of the *intended writ*, the notice must state the *name of the writ and of the Court* from which it will be issued; and the subsequent proceeding must correspond; (y) and it was decided, that a letter from the plaintiff's attorney, stating that he was instructed to take *legal proceedings*, unless goods were delivered up, was insufficient, although the local act merely required *notice of action*. (z) But a slight want of technicality in the name of the writ, as terming it a *precept* (instead of *writ*), called a *latitat*, will not prejudice. (a)

The intended writ must be stated.

This act expressly requires, that in such notice shall be clearly and explicitly contained, the *cause of action*, which the party hath or claimeth against the Justice; and further enacts, that *no evidence shall be permitted* to be given of any cause of action not contained in the notice; and it will be obvious, that as the object of the statute was to enable the magistrate to know the full extent of the injury complained of, in order that he may tender or pay into Court a sum sufficient to cover every ground of damage, the notice ought to communicate not only the very trespass, or other cause of action, but every ground of special damage intended to be proceeded for; and, at all events, the plaintiff will be confined to the claim expressed in the served notice. It was therefore held, that under a notice of an action of trespass for *seizing goods*, value 2*l.*, in plaintiff's dwelling house, he could only recover to that extent for the value of the goods, and nothing for the trespass in the dwelling house; (b) and a notice of action for demanding and taking of the plaintiff toll for and in respect of certain things exempted from toll, was too uncertain; (c) and even if a particular statute require only

What facts and damage must be stated.

(u) *Greenaway v. Hurd*, 4 T. R. 555; *Weller v. Toke*, 9 East, 364; *Morgan v. Palmer*, 2 B. & C. 734; *Cook v. Leonard*, 6 B. & C. 351.

(v) *Prestidge v. Woodman*, 1 B. & C. 12.

(w) *Weller v. Toke*, 9 East, 364.

(x) *Briggs v. Evelyn*, 2 H. B. 114.

(y) *Taylor v. Fenwick*, 7 T. R. 635; *Lovelace v. Curry*, id. 631.

(z) *Leiris v. Smith*, Holt. C. N. P. 27.

(a) *Robson v. Spearman*, 3 Bar. & Ald. 493.

(b) *Stringer v. Martyr*, 6 Esp. R. 134.

(c) *Freeman v. Line*, 2 Chit. R. 673; *Loft's Rep.* 58, S. P.

CHAP. II.
PROCEEDINGS
BETWEEN, &c.

notice of action, without saying *cause* of action, still the notice must state the ground. (d) But it has been held, that in stating the cause of action, the same precision and technicality that has been required in pleading, will not be necessary; and that it suffices if there be sufficient cause of action shewn upon the face of the notice, so as to apprise the Justice of what is intended to be proceeded for; and where a local trespass on land is referred to, and the particulars of which might be ascertained by the Justice himself, on view, Mr. J. Bayley seems to have considered it sufficient to point the Justice's attention to the general nature of the injury, so that he might go upon the premises and himself ascertain the full extent of the damage. (e) Where a notice was of process, "for the said imprisonment and sum of money," and the declaration was for "an assault, BATTERY, and imprisonment," it was held, that at most, the plaintiff was only precluded from recovering any damages for the battery. (f)

Recommended
form of notice
(g).

It is, however, recommended, that the notice of action do not only state all the facts complained of, in the order in which they arose, but also the actual damages that resulted, whether they

(d) *Towsey v. White*, 3 B. & C. 133.

(e) *Jones v. Bird*, 5 B. & C. 837.

(f) *Robson v. Spearman*, 3 Bar. & Ald. 493.

(g) To C. D., Esquire, acting as one of his Majesty's justices of the peace for the county of —.

Form of notice
of an intended
action to a
Justice for
false imprison-
ment.

Sir,
I, A. B., of —, in the county of —, Esquire, do hereby, according to the form of the [statute in such case made and provided, give you notice that I shall, by my attorney, Mr. E. F., of —, in the county of —, at or soon after the expiration of one calendar month from the time of your being served with this notice, cause a writ of summons to be sued out of his Majesty's Court of King's Bench [or Common Pleas or Exchequer] at Westminster, against you, at my suit, and proceed thereupon according to law. [Then follows the subject matter of the notice, and which, in case of trespasses may be as follows]. For that you the said C. D., on the — day of —, A. D. —, with force and arms, caused me to be assaulted, to wit, at —, in the county of —; and also then caused me to be apprehended and seized and laid hold of, and to be forced and compelled to go into, through, and along divers public highways, streets and places, to a certain police office, situate and being at —, in the county of —, and to be unlawfully imprisoned and kept and detained in pri-

son, in a certain dark and unwholesome prison or place, without any reasonable or probable cause whatsoever, for a long space of time, to wit, for the space of — hours, then next following, contrary to the law and custom of this realm, and against the will of me the said A. B.; whereby I the said A. B. was then not only greatly hurt and injured, but was also thereby greatly exposed and injured in my credit, character and circumstances. And also for that you the said C. D., on the day and year aforesaid, with force and arms, &c. caused another assault to be made upon me the said A. B., to wit, at — aforesaid, in the county aforesaid, and caused me to be then beat, ill-treated, and apprehended and imprisoned, and kept and detained in prison, without any reasonable or probable cause, for a long time; to wit, for the space of — hours then next following, contrary to the laws and customs of this realm, and against the will of me the said A. B.; and other wrongs to me the said A. B. then did, to my damage of 100/., and against the peace of our Lord the now King. Dated this — day of —, A. D. —.

Yours, &c. A. B. of —, in the parish of —, in the county of —.

[N. B. To be indorsed as follows:]

"E. F., of No. 10, in — street, in the town of —, in the county of —, attorney for the within named A. B."

were the necessary or natural consequences of the illegal act, and also special and particular damage, however remote, so that in the declaration, and on the trial, the plaintiff may have the fullest latitude in proof and argument to the jury, to increase the damages; and it will, in general, be found most convenient to let the notice be nearly in the form of a *subsequent declaration*, and in effect similar to the subscribed form, (g) more especially as no unnecessary technicality can be objected to; (h) unless indeed, it should *mislead*. (i)

It seems to be established to be sufficient to state the *facts* complained of, and their prejudicial consequences, without suggesting any *point of law* or *legal ground of objection*, upon which it is intended to be insisted that the conduct of the Justice was illegal. (k)

Legal objections need not be noticed.

It has been expressly decided, that although the name of the *writ* must be stated, still *the form of the action*, as whether it is intended to be trespass, case, trover, or detinue, *need not be disclosed*; but that if the *form of action* be unnecessarily stated, and yet be *misdescribed*, and the subsequent declaration vary from the notice, then the latter will be considered insufficient. (l) And a notice complaining of a distress, as made under a warrant directed to A. B., when the warrant afterwards appeared to have been directed to C. D., was held a fatal misdescription, because it was calculated to mislead. (m)

Form of action need not be stated.

Although the act requires notice to the *Justice*, of the *intended writ* to be served upon *him*, it has nevertheless been holden in the Court of Exchequer, and on the circuit, that it is not necessary to name in the notice all the parties intended thereafter to be included as defendants in such writ, or to express, where several parties are named in the notice, whether it is intended to sue the Justice and them jointly or severally. (n) But where a notice of action was served upon a person who acted as a clerk to two bodies of public officers, and the notice was addressed to him as clerk of *one* body, but the cause of action accrued in respect of something done by the other body, such notice was held insufficient. (o)

To whom notice to be addressed, and on whom served.

(g) See note (g), p. 66.

(h) *Gimbert v. Coyney*, 1 M'Clel. & Young, 469.

(i) *Aked v. Stocks*, 1 Moore, & P. 346; 4 Bing. 509.

(k) *Res v. Justices of Devon*, 1 M. & S. 412.

(l) *Satin v. De Burgh*, 2 Campb. 196; *Strickland v. Ward*, 7 T. R. 631; 4 M. & Ry. 300, in note; but see Chit. Col.

Stat. 647, note (o).

(m) *Aked v. Stocks*, 1 Moore & P. 346; 4 Bing. 509.

(n) *Res v. Jones*, 5 Price R. 168; S. P. on Home Circuit, Maidstone, A. D. 1824; and see *Agar v. Morgan and others*, 2 Price R. 126; *Jones v. Simpson and another*, 1 Tyrw. R. 32; 1 Crompt. & J. 174.

(o) *Hilder v. Dorre* 11, 1 Taunt. 383.

CHAP. II.
PROCEEDINGS
BETWEEN, &c.

Indorsement
on notice of
attorney's
abode.

The very object of requiring the notice of action was to enable the Justice to know to whom he might apply before the commencement of an action, and tender amends; it was therefore required, that on the *back* of the notice shall be *indorsed* the *name* of the attorney or agent for the intended plaintiff, together with the place of his abode. The 24 Geo. 2, c. 44, does not also require the place of the *plaintiff's* abode to be stated, but only that of the attorney; that being considered sufficient to enable the Justice to go and make a tender. But the Custom and Excise Acts expressly require the abode of the plaintiff to be stated.^(p) It has been held sufficient if the *surname* of the attorney be stated, although only the initial of his Christian name be given.^(q) And although acts, in protection of public officers, are generally to be construed strictly, yet it has been holden, that if the name and place of the attorney's abode be stated in the body, it suffices, although the statute, in terms, requires an *indorsement* of the same.^(r) It usually suffices, to describe the place of abode of the attorney, as generally of a particular town, however considerable, as "*of Birmingham;*" but this does not extend to such a metropolis as London;^(s) and at least "*of London,*" when the residence was in Westminster, was considered insufficient;^(t) and certainly the preferable course is to name the number of the house, and the street, and the part of the town where the street lies, when there is the least risk of there being several streets of the same name.

Under the Customs and Excise Acts, which require the place of the intended plaintiff's abode to be stated in the notice, his abode at the time of serving the notice must be stated distinctly; and therefore it was held, that a notice of action against a Custom-house officer for breaking the plaintiff's house in Cable Street, &c., was not a sufficient description of the plaintiff's *then* abode, for he might have removed since the trespass was committed, or he might have had two houses.^(u)

Other peculiar
protections in
different sta-
tutes.

The constructions upon this principal act are in general equally applicable to all other enactments *in pari materia* and passed with the same object, as in the instance of officers of Customs and Excise, and other public officers; and in doubtful cases, therefore, reference should always be had to such decisions, but with this general *precaution*, that in each particular case every varying

^(p) See *infra*.

^(q) *Mayhew v. Lorke*, 7 Taunt. 63; 2 Marsh. 377, S. C.; and *James v. Swift*, 4 B. & Cres. 681.

^(r) *Crooke v. Curry*, Tidd. 9th ed. 30, 7 T. R. 634, in note; *sed quere*.

^(s) See *Ward v. Folliott*, 3 Bos. & Pul. 551; *Stears v. Smith*, 6 Esp. R. 138; 6 Bing. 90.

^(t) *Mills v. Collett*, 2 Man. & Ryl. Mag. Cases. 262.

^(u) *Williams v. Burgess*, 3 Taunt. 127.

word in the general or local act, must be particularly examined, in order to ascertain whether it could lead to a conclusion different to that recognised, as relates to the general statute respecting Justices; as for instance, the enactment relating to Justices, requires that the notice of action shall state even the name of the intended process; whereas the statute relating to the Customs, does not perhaps even virtually require that specification. (u)

The act requires "*at least*" one calendar month's notice, and therefore it would seem that the day of service of the notice, and that on which it expires, ought to be excluded, but it has been decided otherwise. (*)

When the
month expires.

In all cases, where the wrong complained of may, by any possibility, have been committed under color of some local act, great care must be observed to comply with its regulations, as well as those of any general act, before the commencement of any action or other proceeding.

General pre-
cautions.

In cases where the ability, as well as the probity of the client are doubtful, it is prudent, however unpleasant and obnoxious, to give the defendant an early notice that such attorney requires the latter to pay or give security for the debt and costs to such attorney, and not to his client; nor otherwise to prejudice his general or particular lien; and further requiring that no compromise shall take place, or security be delivered or taken, or arrangement made, unless with the express concurrence of the attorney or solicitor, for otherwise the latter may lose such lien or security; (v) and where, no such notice having been given, the plaintiff, pending the suit, compromised it with the defendant without consulting the plaintiff's attorney, it was held, that the latter could not afterwards proceed in the action to recover his costs; (w) though it would be otherwise if he could establish that there was an *actual fraudulent* agreement to cheat him of his costs. (x) But in general, if after such a notice has been

Thirtiethly,
notice of
attorney or
solicitor to op-
ponent, to se-
cure his lien.

(u) Tidd. Prac. 8th ed. 27; Chitty's Col. Stat. 263, note (f), and 646, note (f).

(*) In 3 T. R. 623, and 2 Campb. 294, the day of service was included; but see 4 Man. & Ryl. 300, note b; 3 B. & Ald. 581; 5 Bing. 339. The *six months* are reckoned *exclusive* of the first day; see *Hardy v. Ryle*, 9 B. & Cres. 603, *semble* over-ruling 4 Moore, 465.

(v) *Ex parte Hart*, 1 B. & Adolph. 660; *Welsh v. Hole*, 1 Dougl. 238; *Read v. Dupper*, 6 T. R. 361; *Chapman v. Haw*, 1 Taunt. 341.

(w) *Graves v. Eades*, 5 Taunt. 429; 1 Marsh. 113, S. C.; *Rooke v. Wasp*, 5 Bing. 190; 2 Moore & P. 304; *Nel-*

son v. Wilson, 6 Bing. 568; *Charlwood v. Berridge*, 1 Esp. R. 345, *accord*. Where the debt has been paid after the commencement of an action, without the costs and without any *express agreement* to give up the costs, the action may in general be proceeded in, if the costs be not paid, after notice of the intention to proceed; *Toms v. Powell*, 6 East, 536; 6 Esp. R. 40, S. C.; *Cole v. Bennett*, 6 Price, 15.

(x) *Swain v. Levate*, 2 Bos. & P. new Rep. 99; *Graves v. Eades*, and *Nelson v. Wilson*, *supra*, note (w); *Martin v. Francis*, 2 B. & Ald. 402; 1 Chit. R. 241, S. C.

CHAP. II.
PROCEEDINGS
BETWEEN, &c.

given the defendant should pay the plaintiff, he would continue liable to pay the attorney the amount of his lien; (y) and a collusive release would be inoperative. (z) An exception to this rule seems recently to have been established, where the damages are purely unliquidated, as for an excessive distress, and in which it was held, that provided there was no actual fraud, a release might be effectually given and executed, after notice not to compromise. (a) The same rules also prevail in equity; and therefore where a plaintiff's solicitor, with notice, suffered the defendant to make a collateral arrangement for satisfying the plaintiff's demand, without taking effectual security for the payment of his costs, as by suffering his client to take from the defendant his undertaking to the plaintiff, instead of to his solicitor, to pay the costs, the Court would not suffer him to proceed in the suit against the defendant for recovery of them. (b)

Fourteenthly,
Proceedings of
several descrip-
tions, and
which to select.

The already enumerated *precautionary measures* having been considered and taken when necessary, and some description of litigation having become necessary, the important question then will be, *which* of several remedies *must* or *should be* preferred. The least hostile is *an arbitration*; the most expeditious and less expensive, *a summary proceeding before Justices*; or in some inferior Court, as of *Requests*; or, lastly, as regards proceedings in Courts of *Common Law*, *an action*; or in Criminal Courts, a prosecution by *information* or *indictment*.

With respect to *arbitration*, it is sometimes compulsory, and must be adopted; but it is in general optional, and will be considered in the next chapter. For *small injuries*, whether to the person or to personal or real property, when not indictable, and where the damages do not exceed 5*l.*, modern acts enable the party injured to proceed before one or two justices of the peace, though in form rather for punishment than compensation, and leave the party injured the option of proceeding by action. Other statutes punish small offences by pecuniary penalties, the proceeding before justices for which also operates as preventive for the repetition of similar injuries, rather than as private satisfaction. These will be considered in the fourth chapter.

The remedies for *considerable injuries*, or for any injury where an important or *permanent right* is in question, are in

(y) *Ex parte Hart*, 1 B. & Adolph. 660; *Welsh v. Holé*, 1 Dougl. 238; *Read v. Dupper*, 6 T. R. 361; *Chapman v. Haw*, 1 Taunt. 341.

(z) *Ormerod v. Tate*, 1 East, 464; *Gould v. Davis*, Crompt. & J. 415; 1 Tyr.

380, S. C.

(a) *Ex parte Hart*, 1 B. & Adol. 660; *sed quare*.

(b) *Morse v. Cooke*, 1 M'Clel. 211; and 13 Price, 473, S. C.

general by *action* in one of the superior Courts, the practical modes of conducting which in the superior Courts will constitute the principal subjects of inquiry in the *Fifth* and subsequent chapters of this part of the work.

We have, in some preceding pages, adverted to the importance of a judicious choice of a remedy proportioned to the nature of the right and of the injury. The intelligence and judgment of an attorney cannot be more strikingly evinced than in this part of his professional conduct. (c)

Immediately after it has been resolved that proceedings by and against certain parties shall be instituted in any particular Court, and where there is a probability of a trial or hearing on any particular circuit, or at any particular sessions, it is the duty of the attorney to consult with his client as to the counsel to be retained on his behalf, and which should be effected without the *least delay*, so as not to be anticipated by the opponent. (d) Such counsel should be retained who will be certain to attend at the place of trial or hearing, (e) and whose knowledge and experience, either generally or on the particular subject, will render them most able to conduct the cause. In choosing counsel, care must be observed that their interest or particular opinions are not calculated to interfere with the interest of the client. In general, when there is a strong preponderance of law and fact in favour of the client, his cause would probably succeed, whoever may conduct it; but unquestionably where the merits are nearly balanced, the weight of superior talent of a particular counsel would probably turn the scale; and therefore it is always the duty of the attorney, in every cause that will be substantially defended, to secure the best counsel. In causes of any difficulty, and where there are two or more witnesses for the party on whose behalf the brief is to be delivered, briefs even to three counsel may be allowed on the taxation of costs between party and party, and sometimes there should be as many retainers. (f)

Fifteenthly,
Retaining
Counsel.

(c) *Ante*, 1 Vol. 15 to 31, as to the choice of one of several proceedings, and in particular, page 23, as to actions in the Superior Courts for small injuries.

(d) In prudence, where resistance is anticipated, counsel should be retained, even before the plaintiff's attorney has written his letter to the defendant, as advised in the following section.

(e) Before retaining counsel, it should

be resolved in which *Court* the action is to be brought, and in what county the *venue* will be laid, and the cause *tried*, and in which Court a motion for a *new trial* would be made; and it should be well considered whether the leading counsel will attend on each occasion; see *post*, "*Venue*."

(f) 1 Chitty's R. 544; Tidd, 9th ed. 799. See regulations in Equity, 5 Russell R. 23.

CHAP. II.
PROCEEDINGS
BETWEEN, &c.

But in taxing costs only the retainer of the leading counsel is allowed against the opponent, it being considered most probable that abundant counsel will be found upon the circuit or sessions competent as juniors, and that therefore there could be no absolute occasion for retaining more than a leader. When on behalf of an expected plaintiff or defendant it is not quite certain who will be the exact parties, it is usual to deliver a *general* retainer, which secures the counsel for the client in all matters that may arise during the life of the party on whose behalf it is given, so that he do not omit to offer to the counsel retained a brief in every case where he could hold the same. But the cost of a general retainer is never allowed on taxation between party and party.

CHAPTER III.

OF REFERENCES TO ARBITRATION, AND PROCEEDINGS THEREON. (a)

First, PRELIMINARY OBSERVATIONS.		4. Appointment of umpire -	93
When a reference proper. -	73	5. Meetings before arbitrator -	94
When not - - -	75	6. Enlargement of time -	96
Secondly, Who may refer -	77	7. Proceedings before arbitrator	97
Thirdly, Utility of reference and award to obtain opinion of Court	78	8. Enforcing attendance of witnesses, &c. -	98
Fourthly, Distinctions between references at Common Law and under the Statutes -	79	9. Arbitrators swearing witnesses -	100
Fifthly, Who to be the arbitrator or umpire -	83	10. Examination of witnesses, &c. -	101
How to act if arbitrator refuse to proceed -	84	11. Mode of taking the evidence -	102
Sixthly, THE PRACTICE AND LAW	85	12. Of revocations -	102
1. Terms of submission -	85	13. Of the award -	105
No amendment of, when	89	14. Of certificates -	112
2. Affidavit of execution of submission -	91	15. Of setting aside award -	116
3. Making submission rule of Court - - -	92	16. Of enforcing award -	122
		17. Jurisdiction in equity -	124
		18. Of awards under particular statutes -	125

HOWEVER imperfect and objectionable may be the mode of deciding upon *facts* by a *jury*, it seems difficult to suggest a more satisfactory tribunal. The best informed individuals so frequently differ in opinion upon questions of fact, and even upon the clearest questions of ethics, that we cannot ever anticipate a certain just and correct decision upon any subject, by *one* or *two* individuals, even admitting that they are free from prejudice and from indulgence of resentment, and are, in every sense of that term, just; and hence, men naturally prefer an open trial by jury, with the chance of a new trial, and of an appeal to a superior tribunal, to a private decision by an arbitrator. If the justice of this reason be doubted, let any one read the reports of the decisions, even of the Superior Judges, and especially those relating to *criminal cases*, where each

CHAP. III. OF REFERENCES TO ARBITRA- TION, &c.

First, PRELIMINARY OBSERVATIONS as to References to Arbitration, and when, and under what circumstances, they are expedient.

(a) See a clear practical summary, Tidd's Practice, 9th ed. 819 to 846; see in general Kyd on Awards; Caldwell on Arbitrations; Watson on Arbitration; 2 Madd. Ch. Prac.; Com. Dig.; and

Bac. Abr. tit. Arbitrement; 3 Chitty's Com. Law, 68, 637 to 667. It is singular that many of the principles of the law of nations, in Vattel. Law Nat. 274 to 289, will be found applicable.

CHAP. III.
OF REFERENCES
TO ARBITRA-
TION, &c.

Judge is necessarily most anxious to decide for the best; and where it will be found, that not unfrequently, upon apparently easy questions, eight will be of one opinion and seven of another. (c) Besides, if the proposed arbitrator have not had a *professional education*, he will be insufficiently acquainted with the principles of law and of evidence, and will consequently frequently err, even if wholly uninfluenced by any unjust partiality or prejudice; and if he be a *Barrister*, he will probably not have had great experience, because those who are in great practice cannot spare the time to devote several *continuous* hours, as is essential to a *speedy* conclusion of a reference, and numerous meetings frequently adjourned to distant periods, and perhaps of not two hours' duration, and attended by counsel on each side, are even more expensive than a trial. It is therefore a natural desire of litigating parties not to trust their case to the decision of a single arbitrator, or even of three; for if *Judges* will doubt, and sometimes misapprehend the law or the facts, what confidence can be justly reposed in the opinions of men naturally supposed to be of inferior talent. As, therefore, *trial by jury* has long been considered every Englishman's birth-right, it is not surprising that hitherto any attempt generally to take away that right, and *force* arbitration, even under the recommendation of a Judge, has been unsuccessful. (d)

The principal instances of successful attempts to *compel* arbitrations, will be found in the *Friendly Society Act*, (e) and the *Saving Bank Act*, (f) and those relating to *Labourers* and *Servants* in certain trades; (g) in regard to which, respectively, acts have been passed prescribing that remedy. So, disputes respecting *Seamen's wages* were to be awarded upon, or settled by, a magistrate; (h) and certain claims for *Salvage* are to be settled by the award of magistrates. (i) The *first class* of these cases relates to persons little able to sustain the expense of formal litigation; and, therefore, it was even mercy to them to *compel* them to adopt a summary mode of settling the dispute; and as to *salvage*, as *ships* might be detained whilst

(c) See *Russ. & Ry. Crown Cases*; *Moody's Cases*, *per tot.* As upon a question whether an *outbuilding* is part of a dwelling-house: whether there can be a *wound* without the continuity of the skin being broken; *Burrow's case*, *Mood. C. C.* 274; *Wood's case*, *id.* 278.

(d) *Ante*, 1 Vol. 21, 22.

(e) 10 Geo. 4. c. 56. sect. 27.

(f) See former *Saving Bank Act*, 9 Geo. 4, c. 92; sect. 45; *Crisp v. Hun-*

bury, 8 Bing. 394; shewing, that in such case no *action* can be supported; and see the present Act, 10 Geo. 4, c. 56.

(g) 5 Geo. 4, c. 96; and see *Burn. J. tit. Servant*.

(h) 59 Geo. 3, c. 58; *Minerva*, 1 Hagg. Rep. 54.

(i) 1 & 2 Geo. 4, c. 75; *Jonge Nicholas*, 1 Hagg. 201.

a formal suit in the Admiralty was deciding, a more expeditious remedy for the service became essential for the interests of shipping and commerce.

CHAP. III.
OF REFERENCES
TO ARBITRA-
TION, &c.

When a refer-
ence is proper.

The instances in which an arbitration *should be adopted*, in preference to any litigation, are principally those, when from the very nature of the subject, it would ultimately, by a judge and jury, be properly considered a case *unfit to be tried* in Court, as in cases of long and intricate accounts; and where, to obtain a clear understanding, it would be necessary to refer to numerous documents, and make or explain calculations, and through which each of the twelve jurors in the jury box could not conveniently proceed, so as to form his own judgment. In such and the like cases, even days might be consumed on a trial, without even the probability of the jury arriving at a just conclusion, and the party persisting in a formal trial would inevitably so predispose a jury against him as probably to suffer in the result. In such a case, the whole cause should be referred, in the *first instance*, or the party should agree to refer the matters of figure, and try the cause upon one or more distinct points of fact that may be readily, and within a convenient time, disposed of by the jury. Thus consenting to relieve the jury from too embarrassing an investigation, they will perceive that the parties are disposed to try the cause fairly, and will, consequently, give the single disputed point full and just consideration. Other cases fit to be referred, are frequently those where it would be impracticable or difficult to collect or keep together several witnesses, so as to attend upon a fixed day at Nisi Prius; or disputes between neighbours, respecting supposed nuisances by buildings or otherwise, to ancient lights or watercourses; ways or other property, where not only the rights of the parties may be referred, and the damages, but also the question whether, upon any and what terms, and subject to what modifications, the alleged nuisance shall or not be continued. So, as an award upon a title to land is binding on all the parties, it would be proper in questions of right to small property, to refer the matter to some competent person.^(k) So, subjects of delicacy, unfit to be exposed to public investigation, especially between near relations, should be referred, unless some injury to character has been occasioned.

But, on the other hand, in cases of calumny, requiring *public contradiction*, or open apology, it would not be proper to refer to arbitration; nor should a claim for compensation for Crimi-

When a refer-
ence is improp-
er!

(k) *Doe v. Russen*, 3 East, 11; *Prosser v. Goringe*, 3 Taunt. 426.

CHAP. III.
OF REFERENCES
TO ARBITRA-
TION, &c.

nal Conversation be so referred, because the House of Lords require the verdict of a jury antecedent to a divorce *a vinculo matrimonii*. If, however, the husband have no intention to seek such a divorce, a reference may be made. *(l)* We have seen, in a preceding page, that in general matters of a *criminal nature* cannot be legally or effectually referred to arbitration, unless by permission of the Court. *(m)* Again, when one or more witnesses to an important fact would require strict cross examination in public, before a judge and jury, so as to elicit truth, it might be dangerous to refer to arbitration, when the witnesses, if so disposed, would probably swear without apprehension of consequences. So, where sureties, or bail in an action or replevin suit, are responsible, a reference, without their concurrence, will, in some cases, although not in all, discharge them from liability. *(n)*

Not when a defence is *stricti juris*, unless under qualified terms.

When the plaintiff or defendant resolves to stand upon some strict *legal* right or objection that may not accord with the equity or justice of the case, then it would be injudicious to refer, at least without expressly stipulating that if any legal objection, either to the evidence or to the result, should be taken, then absolutely, the party *shall have* the benefit of it, and *negatively*, that it *shall not* be in the discretion of the arbitrator to deny effect to it; for, unless expressly controlled in this respect, some arbitrators will exclude a legal ground of defence, such as usury, *(o)* or a forfeiture between landlord and tenant, and make their award according to what they consider is the justice of the case; and such award would, unless *expressly provided* otherwise, be sustained, and consequently the client prejudiced. *(p)* In such a case, the submission and rule of Court must be express; not that the arbitrator shall be at *liberty* to state the facts or objections specially, but that he *shall state* the same, if requested by the party, so as to be *peremptorily* compulsory upon him; and even then, sometimes he might come to a conclusion, that no legal objection was raised by *the evidence*; so that in each particular case, it will be essential to be cautious in the terms of the reference. *(q)*

(l) *Soilleux v. Herbst*, 2 Bos. & Pul. 444.

(m) *Ante*, 1 Vol. 17, and 1 Nev. & Man. 275.

(n) *Archer v. Hale*, 4 Bing. 464; *Alldridge v. Harper*, 10 Bing. 118.

(o) *Delver v. Barnes*, 1 Taunt. 48, and other cases in next note, 6 Taunt. 254.

(p) Per Lord Thurlow, in *Knor v. Simmons*, 1 Ves. 369; per Holroyd, J.

in *Richardson v. Nourse*, 3 B. & Ald. 240; *Wohlenburgh v. Lageman*, 6 Taunt. 254; *Price v. Hollis*, 1 Maule & S. 105; *Boutilleg v. Thick*, 1 Dow. & Ry. 366; *Cramp v. Symms*, 7 J. B. Moore, 434; 1 Bing. 104, S. C.; *Wood v. Griffith*, 1 Swanst. 59; *Ainsley v. Goff*, Kyd on Awards, 351; and Watson on Arbitration, 162.

(q) See form, *post*, 87, 88, 90.

Secondly, who may refer. An INFANT or married woman, cannot effectually refer to arbitration; and, although in general the party contracting with them would be bound to perform his part of the contract, there are exceptions to that rule as respects references, on account of the want of mutuality. (r) One of several PARTNERS may bind himself, but not the others, by his submission, even of matters arising out of the business of the firm. (s) With respect to AGENTS, in general, they must have *express* power to refer; but a power of attorney, "to act" on his behalf in dissolving a partnership, with authority to "appoint any other person as he might think fit," authorizes the agent to submit the accounts to arbitration. (t) At law, a *Counsel* or *Attorney* may bind his client by his consent to an order of *Nisi Prius*, referring a particular case; nor will the Court allow the party to avoid the reference upon affidavit that it was wholly against his will, or even express prohibition. (u) And an attorney has equal power to consent to an enlargement of the time for making the award. (v) But it was held, in an old case, that *in equity* a *solicitor* cannot bind his client by agreement to refer, without express authority. (w) Nor at law, should counsel or an attorney take upon himself to refer a cause unless he have express authority or direction to act generally for the best, or the client refuses to communicate upon the subject; in either of which cases, he would be justified in acting according to the best of his judgment. The prudent course is always to have the client in Court, and let him decide for himself.

Executors, we have seen, should not, when claimants, refer to arbitration without the concurrence of creditors, legatees, and next of kin. (x) When defendants, they would incur the risk of an award, subjecting them personally to liability, unless by the terms of the reference the power so to award be carefully guarded against. (y) *Assignees* of a bankrupt (z) or of an

By executors,
assignees, &c.

(r) *Biddle v. Dowse*, 6 B. & Cres. 255, overruling *Dowse v. Coxe*, 3 Bing. 20, as to infants; and *ante*, 1 Vol. 825.

(s) *Stead v. Salt*, 3 Bing. 101 and 500; 4 J. B. Moore, 340; *Strangford v. Green*, 2 Mood. 228; *Mudy v. Osain*, Litt. Rep. 30; 15 East, 209.

(t) *Healey v. Stoker*, 8 B. & Cres. 16; and see *Dyer*, 216, b; *Cayhill v. Fitzgerald*, 1 Wils. 25, 58. The agent, in such a case, must take care that the submission do not make him personally liable; *Bacon v. Dubarry*, 1 Lord Raym. 246; and see, as to an agent's power, *Godson v. Brooke*, 4 Campb. 163; 3 Taunt. 486, 378; 1 M. & S. 719.

(u) *Filmer v. Delbar*, 3 Taunt. 486, 1 Salk. 86; 1 Chit. R. 193, *accord*;

5 Taunt. 628; but see 6 B. & Cres. 255, and Tidd, 9th ed. 820.

(v) *Rex v. Hill*, 7 Price, 644.

(w) *Colwell v. Child*, 1 Chan. Cas. 86; 1 Chan. R. 104; Chit. Eq. Dig. Solicitor and Client, 1238. *sed quare*.

(x) *Ante*, 1 Vol. 532; see notes, Bac. Ab.; Arbit. C.; Com. Dig. Administration, L. I. and Assets, C.

(y) *Pearson v. Henry*, 5 T. R. 6; *Barry v. Rush*, 1 T. R. 691; *Worthington v. Barlow*, 7 T. R. 453; 4 Dow. & Ry. 814; *Robson v. ———*. 2 Rose, 50; and *in matter of Joseph and Webster*, 1 Russ. & M. 496. *Post*, 91, form.

(z) 6 Geo. 4, c. 16, s. 88; 1 & 2 W. 4, c. 56, s. 43.

CHAP. III.
OF REFERENCES
TO ARBITRA-
TION, &c.

insolvent debtor are expressly prohibited from referring to arbitration, unless with the consent of the major part in value of creditors present at a duly convened meeting, or of the commissioners testified in writing, in case less than one-third in value of the creditors should neglect to attend; (a) and there is a provision nearly to the same effect in the General Insolvent Act. (b) But Assignees and Trustees should, in their submission to reference, expressly guard against personal liability, the same as executors, or they may be personally liable. (c)

Thirdly, suggested utility of a reference to find facts for the opinion of the Court.

In aid of an object recently declared by the Legislature to be conducive to *speedy justice and diminution of expense*, arbitrations may with propriety be greatly extended in practice, viz. *by having the facts stated concisely by the arbitrator, and then obtaining the opinion of the Court thereon without the expense of pleadings or trial.* The recent acts for the further amendment of the law enable parties to any action or information, *but not until after issue joined*, by consent and by order of any of the Judges of the superior Courts, to state the facts of the case in the form of a *SPECIAL CASE* for the opinion of the Court, (but without the power of feigning a *special verdict*) and to agree that a judgment shall be entered for the plaintiff or defendant by confession or of *nolle prosequi* immediately after the decision of the case, or otherwise, as the Court might think fit. (d) Before that enactment, no such special case could be stated until after the expense of a trial had been incurred, and it was considered culpable in any practitioner even to attempt to obtain the opinion of the Court by a *pretended special case*. (e) But at all times since the statute 9 & 10 W. 3, c. 15, or when a submission has been made a rule of Court, an *award* may find facts specially, subject to the opinion of the Court, and who will, after argument, determine upon the same; (f) and consequently, *before issue joined*, and before even the commencement of an action, parties may, by any memorandum in writing, submit their differences to arbitration, with an express clause that such submission *shall* be made a rule of Court, and that the arbitrator *shall* by his award find the facts, and state any objection or point of law arising upon the evidence.

(a) 6 Geo. 4, c. 16, s. 88; and 1 & 2 W. 4, c. 56, s. 43.

(b) 7 Geo. 4, c. 57, s. 24.

(c) *Robson v. —*, 2 Rose's Bankruptcy Cases, 50. As to Trustees, see *in re Wansborough*, 2 Chit. R. 41; *post*, 91; but see Tidd, 836, *semble contra*.

(d) 3 & 4 W. 4, c. 42, s. 25.

(e) *Re Elam*, 3 B. & Cres. 597.

(f) *Aubert v. Mase*, 2 Bos. & Pul. 372, where the Court approved of the course taken to state the facts for the opinion of the Court; and see the form presently stated; see also *Ames v. Milward*, 8 Taunt. 637; 2 J. B. Moore, 713, S.C.; *In re Webb*, 8 Taunt. 443; 2 J. B. Moore, 500, S. C.

specially, and make his award, so that the opinion of the Court may be thereupon obtained without the expense of any process or pleadings; and such a proceeding is strongly recommended to parties, who may justly repose confidence in a barrister's faithfully stating the facts with his opinion, subject to the decision of the four Judges, although they might not choose to be bound by the opinion of any single individual.

CHAP. III.
OF REFERENCES
TO ARBITRA-
TION, &c.

Fourthly, agreements to refer to arbitration are either at *common law* or under the *statutes* 9 & 10 W. 3, c. 15, and 1 & 2 W. 4, c. 42, s. 39, 40 & 41. Those at common law may be either verbal, or in writing not under seal, or by specialty, either bond or covenant, or by a rule or order of a Judge of the Court in which an action is depending, and which was not unfrequent even before the above first enactment.

Fourthly,
distinctions
between refer-
ences at Com-
mon Law, and
under the sta-
tutes.

An award, when made before revocation, was equally binding upon the parties at *common law*, whether it were made under a verbal or written authority. And it has been recently decided, that an award so far changes the nature of an original claim, when for *unliquidated damages*, that it precludes a party previously entitled to sue for the same from afterwards so doing, and compels him to confine his remedy to an action for the non-observance of the award; and therefore it was held, that in an action for *unliquidated damages*, or in trespass for damages, a plea of a reference and award is a valid answer, without averring performance of the award; but that in an action of *indebitatus assumpsit* for tolls or any other *debt*, a plea of a reference and umpirage to pay 13*l.* is insufficient, unless it aver performance by payment of the sum awarded; for in the latter case the original demand being for a debt, the award only fixed the amount, and the plaintiff was at liberty to sue either for the original debt or upon the award; and in the former case, to treat the debt as still for tolls, and produce the award in evidence of the just amount of his claim. (g)

But it is settled at common law, that unless the parties be bound by submission made a rule of Court, they may, if no arbitrators have been named, refuse to appoint them, although they have expressly covenanted to refer to arbitration; (h) or may at any time before an award has been made, countermand the arbitrator's authority, so as to render a subsequent award

(g) *Allen v. Miller*, 2 Crompt. & Jer. 47; 2 Tyrw. R. 113.

(h) *Kill v. Holster*, 1 Wils. 129;

Thompson v. Charnock, 8 T. R. 139;
Street v. Rigby, 6 Ves. 815, 821; 2 Ves. J. 136.

CHAP. III.
OF REFERENCES
TO ARBITRA-
TION, &c.

after notice of the revocation *a nullity*; (i) and the agreement to refer is no bar to an action at law or suit in equity; (k) and although an action *may certainly be supported* for the breach of the agreement to refer, (k) yet the damages therein might be merely nominal, and not equivalent to the sum that might have been awarded, unless indeed there has been a very explicit agreement, as is advisable, to pay a named sum equal to the sum claimed as *stipulated damages*, and not as a penalty; (l) and we have seen that in general a Court of Equity will not compel specific performance of a covenant to refer. (m)

The obligation and effect of an arbitration, in pursuance of the statutes 9 & 10 W. 3, and 3 & 4 W. 4, c. 42, s. 39, 40, 41.

Hence when parties considered it probable that an arbitration would turn out unfavourable, they refused to appoint arbitrators; or when appointed, revoked their authority. To remedy these defects, the *statutes* now to be considered were passed, which, especially the recent act, take away the power of revocation where the reference has been by submission to be made a rule of Court, or under a rule of Court or Judge's order, or order of *Nisi Prius*, in the first instance, and requires the arbitrator to proceed *ex parte*, and compels the attendance of witnesses, and subjects them to an indictment for perjury if they swear falsely. (n) But still, where the deed or agreement, as frequently has occurred in partnership deeds, does not contain any stipulation that the covenant to refer shall be made a rule of Court, there is no perfect mode of enforcing the covenant,—a defect which should be guarded against in future stipulations of that nature. When, however, a proceeding by arbitration and award is enjoined by a *public act*, then it may be enforced by *mandamus*; (o) and if an act direct that a claim shall be adjusted only by reference and award, the party proceeding by action would fail. (p)

The enactments in 9 & 10 W. 3, c. 15.

The statute 9 & 10 W. 3, c. 15, intituled "An Act for determining Differences by Arbitration," recites that "it has been

(i) *Marsh v. Bulteel*, 5 B. & Ald. 507; 2 Chitty's R. 316; *Aston v. George*, 2 B. & Ald. 395; 2 Saund. 133, d.

(k) In *Tattersal v. Groote*, 2 Bos. & Pul. 131, it seems to have been doubted whether an action could be supported for refusing to refer according to covenant, *unless it appeared that there was a fair subject of arbitration*; but undoubtedly such an action might be sustained, and sometimes efficiently, so as to recover an equivalent in damages to the full extent of what it can be shewn would have been awarded; and see 2 Keb. 10, 20, 24; *Charnley v. Winstanley*, 5 East, 266; see suggestions of Parke, J.

in 10 B. & Cres. 484; 5 Taunt. 453; Tidd, 9th ed. 824. Suppose a *surety* joined in the covenant to refer, and his principal refused to proceed, there can be no doubt that the surety would be liable to pay to the full extent of the sum which it can be shewn would, or ought to have been awarded in case the arbitrators had proceeded.

(l) As to stipulated damages, *ante*, 872, see the suggested form in note (q), *post*, 92.

(m) *Ante*, 1 Vol. 851, 2, 829 to 831.

(n) 3 & 4 W. 4, c. 42, s. 39, 40, 41.

(o) *Ante*, 1 Vol. 792; *Re Washbrooke*, 7 Dowl. & R. 221.

(p) *Crisp v. Bunbury*, 8 Bing. 394.

“ found by experience that references made by rule of Court
 “ have contributed much to the ease of the subject in determin-
 “ ing of controversies, because the parties become thereby ob-
 “ liged to submit to the award of arbitrators, under the penalty
 “ of imprisonment for their contempt in case they refuse sub-
 “ mission: Now for promoting trade and rendering the awards
 “ of arbitrators the more effectual in all cases for the final
 “ determination of controversies referred to them by merchants
 “ and traders and others concerning matters of account or
 “ trade, or other matters, it is enacted, That it shall and may
 “ be lawful for all merchants and traders, and others desiring
 “ to end any controversy, suit or quarrel, controversies, suits
 “ or quarrels, for which there is no other remedy but by personal
 “ action or suit in equity, by arbitration to agree *that their sub-*
 “ *mission* of their suit to the award or umpirage of any person or
 “ persons *should be made a rule of any of His Majesty's Courts*
 “ *of Record* which the parties shall choose, and to *insert such*
 “ *their agreement in their submission*, or the condition of the
 “ bond or promise whereby they oblige themselves respectively
 “ to submit to the award or umpirage of any person or persons,
 “ which agreement being so made and inserted in their sub-
 “ mission or promise or condition of their respective bonds,
 “ shall or may, upon producing an affidavit thereof made by
 “ the witnesses thereunto, or any one of them, in the Court of
 “ which the same is agreed to be made a rule, and reading and
 “ filing the said affidavit in Court, be entered of record in such
 “ Court, and a rule shall thereupon be made by the said Court
 “ that the parties shall submit to and finally be concluded
 “ by the arbitration or umpirage which shall be made concern-
 “ ing them by the arbitrators or umpire pursuant to such sub-
 “ mission: And in case of disobedience to such arbitration or
 “ umpirage, the party neglecting or refusing to perform and
 “ execute the same, or any part thereof, shall be subject to all
 “ the penalties of contemning a rule of Court where he is a
 “ suitor or defendant in such Court, and the Court, on motion,
 “ shall issue process accordingly, which process shall not be
 “ stopped or delayed in its execution by any order, rule, com-
 “ mand or process of any other Court, either of law or equity, un-
 “ less it shall be made appear *on oath* to such Court *that the*
 “ *arbitrators or umpire misbehaved themselves*, and that such
 “ award, arbitration or umpirage was procured by *corruption* or
 “ *other undue means*.”

The second section enacts, “That any arbitration or umpirage
 “ procured by corruption or undue means shall be judged and

CHAP. III.
OF REFERENCES
TO ARBITRA-
TION, &c.

The enact-
ments in 3 & 4
W. 4, c. 42, s.
39, 40, 41.

“esteemed void and of none effect, and accordingly be set aside
“by any Court of Law or Equity, so as complaint of such cor-
“ruption or undue practice be made in the Court where the
“rule is made for submission to such arbitration or umpirage
“*before the last day of the next term after such arbitration or*
“*umpirage made and published to the parties.*”

The 3 & 4 W. 4, c. 42, s. 39, after reciting “that it is expe-
dient to render references to arbitration more effectual,” enacts,
that the power and authority “of any arbitrator or umpire
“appointed by or in pursuance of any rule of Court, or judge’s
“order, or order of Nisi Prius, in any action now brought, or
“which shall be hereafter brought, or by or in pursuance of
“*any submission to reference containing an agreement that*
“*such submission shall be made a rule of any of his Majesty’s*
“Courts of Record, shall not be revocable by any party to such
“reference, without the leave of the Court, by which such rule
“or order shall be made, or which shall be mentioned in such
“submission, or by leave of a Judge; and the arbitrator or
“umpire shall and may, and is *hereby required* to proceed with
“the reference, notwithstanding any such revocation, and to
“make such award, although the person making such revocation
“shall not afterwards attend the reference; and that the Court
“or any Judge thereof, may, from time to time, enlarge the
“term for any such arbitrator making his award.”

Section 40 enacts, “that when any reference shall have been
“made by any such rule or order as aforesaid, or by *any sub-*
“*mission containing such agreement as aforesaid*, it shall be
“lawful for the Court by which such rule or order shall be
“made, or which shall be mentioned in such agreement; or for
“any Judge, by rule or order to be made for that purpose, to
“*command the attendance and examination of any person to*
“be named, or the production of any documents to be men-
“tioned in such rule or order; and the disobedience to any
“such rule or order shall be deemed a contempt of Court, if in
“addition to the service of such rule or order, *an appointment*
“of the time and place of attendance in obedience thereto,
“*signed by one at least of the arbitrators*, or by the umpire
“before whom the attendance is required, shall also be served,
“either together with or after the service of such rule or order;
“provided always, that every person whose attendance shall be
“so required, shall be entitled to the like conduct money and
“payment of expenses, and for loss of time, as for and upon
“attendance at any trial: Provided also, that the application
“made to such Court or Judge, for such rule or order, shall set

“ forth the county where such witness is residing at the time,
 “ or satisfy such Court or Judge that such person cannot be
 “ found: Provided also, that no person shall be compelled to
 “ produce under any such rule or order, any writing or other
 “ document that he would not be compelled to produce upon a
 “ trial, or to attend at more than two consecutive days, to be
 “ named in such order.”

CHAP. XI.
 OF REFERENCES
 TO ARBITRA-
 TION, &c.

Section 41 enacts, that “ when in any rule or order of refer-
 “ ence, or in any *submission to arbitration containing an agree-*
 “ *ment that the submission shall be made a rule of Court*, it
 “ shall be ordered or agreed that the witnesses upon such refer-
 “ ence shall be *examined upon oath*, it shall be lawful for the
 “ arbitrator or umpire, or any one arbitrator, and he or they
 “ are hereby authorised and required to administer an oath to
 “ such witnesses, or to take their affirmation in cases where
 “ affirmation is allowed by law, instead of oath; and if upon
 “ such oath or affirmation, any person making the same shall
 “ wilfully and corruptly give any false evidence, every person so
 “ offending, shall be deemed and taken to be guilty of *perjury*,
 “ and shall be prosecuted and punished accordingly.”

In selecting an arbitrator, it is scarcely necessary to suggest, that he should be free from interest or even bias, and in general not a near relative, not merely from any apprehension that he would award in favour of his interest or relative, but to avoid the converse; for sometimes the desire to avoid any supposed partiality will too strongly influence an honourable mind in deciding to the contrary. With respect to direct interest, if the parties, fully aware of the objection, constitute a party so interested their arbitrator, they will be bound by his decision; as where Mr. Sergeant Hards, by rule of Court at the assizes, referred a question of deodand of a horse, which he claimed, to the Archbishop of Canterbury, who was the owner, and who awarded against the Sergeant, and the Court refused to interfere; (g) although it would have been otherwise if the Archbishop had been a judge constituted by legal authority, and the parties had not been aware of the interest of the arbitrator; (r) because one of the great ends of the institution of civil society is to prevent men from being judges in cases wherein they are concerned, and to remit the decisions of adverse in-

Fifthly, Who
 to be THE AR-
 BITRATOR or
 Arbitrators.

(g) See *Matthew v. Ollerton*, 4 Mod. 226; Comb. 218; Hard, 44; and see 3 Bla. Com. 299; Hob. 87.
 (r) Id. *ibid*.

CHAP. III.
OF REFERENCES
TO ARBITRA-
TION, &c.

terests to those *who can have no interest in the determination* of any such cases. (s)

If the question in dispute be entirely matter of account, or a question of damages, then proper valuers may be appointed; but in general, as it is difficult to anticipate that some question of law, either as respects the admissibility of evidence or otherwise, will not arise, it has been found that a reference to a barrister is more certain and satisfactory; for he may hear and be properly *influenced* upon all questions of value, by competent witnesses, although he could not delegate his decision to a third person, (t) and he will be ready at all times to decide on the propriety of admitting the evidence; and his very habit of attending courts of justice, will better enable him to decide upon all questions of general reasoning, with more facility and correctness than most other individuals.

It has been suggested by a very sensible and generally accurate author, that as regards the power of compelling the attendance of witnesses, the expression in the 40th section of 3 & 4 W. 4, c. 42, "signed by one at least of the arbitrators, "or by the umpire," would import that such power did not apply where there is only one arbitrator; (u) and if so, it would be prudent to appoint at least *two* arbitrators with an umpire; but it is submitted that the enactment clearly extends to the case of a single arbitrator. (v)

Precautionary provisions for another arbitrator.

When time will allow, it is always advisable, before the agreement or rule or order of reference is concluded, to ascertain whether the arbitrator will accept the office, or at least to provide for the contingency, by specifying, "or his nominee or "nominees, until an award has been perfected;" or "such "other person as shall be appointed in that behalf by the said "Court or any Judge thereof." This is essential, because it has been held that the condition of a recognizance to abide the award of D. cannot be varied by a rule of Court substituting M. for D.; (w) and although the difficulty might unquestionably be remedied by a new agreement of reference, it frequently occurs, that at a subsequent time one of the parties will not concur.

How to act if arbitrator refuse to proceed.

In case the appointed arbitrator should refuse to accept the reference, or at any time refuse to proceed further, then unless

(s) Per Lord Stowell, in case of *Two Friends*, 1 Rob. Rep. 282.

(t) *Hopcroft v. Hickman*, 2 Sim. & Sta. 130; *ante*, 1 Vol. 830.

(u) Mr. Theobald's observations on the act 3 & 4 W. 4, c. 42; and Legal

Observer for October, 1833, p. 492.

(v) See also section 41, which speaks of only *one* arbitrator, or of several, as regards the swearing a witness.

(w) *Res v. Bingham*, 1 Crompt. & J. 245.

the appointment of another arbitrator has been provided for; as suggested, the only course will be to proceed in the action or prosecution as if no reference had taken place; (x) and the Court of Chancery has refused to compel an arbitrator to proceed, although he had accepted the reference, and in part heard the case. (y) But where a verdict has been taken subject to a question of law, and the damages to be settled by a named barrister, and the Court had decided the question of law in favour of the plaintiff, and the barrister afterwards refused to assess the damages, because he had advised for one of the parties, and one of the defendants refused to consent to the appointment of another barrister; the Court on motion ordered that the plaintiff should be at liberty to issue execution for the sum found by the verdict, unless the defendant would consent to refer to another arbitrator within a named time. (z) And when a verdict has been taken absolutely for the plaintiff, and the amount of damages only referred, the Court have supplied a defect attributable to accident, and allowed execution for the amount of the verdict, unless the defendant will consent to a completion of the reference. (a) But in general, where a reference has become abortive without fault of the defendant, the Court will not assent; and if he refuse to consent to a perfect appointment of an arbitrator, the only course is to proceed in the cause, unless the appointment of a fresh arbitrator has been originally provided for.

Having resolved upon an arbitration and an arbitrator, the next consideration is the practical mode of conducting it, and which may be arranged under the following heads:—1. The submission. 2. The affidavit of its execution. 3. Of making the submission a rule of Court. 4. The arbitrator's appointment of another arbitrator or umpire. 5. Of the meetings before the arbitrator, and his written appointment thereof— notices thereof.—6. Enlargement of time.—7. Proceedings before the arbitrator, &c., including the examination of witnesses and evidence, and of the parties. Of revocations in fact or law. Of the award and its publication, and the subsequent proceedings to set aside or enforce the award.

*Sixthly, the
PRACTICE AND
LAW.*

The terms of submission or reference, whether by agreement, bond, deed, order, or rule of Court, require more care than has been usually observed; and they should be considered

*1st, The terms
of the Submis-
sion.*

(x) *Crawley v. Collins*, 1 Wils. Ch. C. 31; 3 Swanst. 90.

(y) 3 Swans. 90; 2 Mad. Ch. Prac. 713.

(z) *Wolley v. Kelly and others*, 1 B. & Cres. 68.

(a) *Taylor v. Gregory*, 2 B. & Adol. 774.

CHAP. III.
OF REFERENCES
TO ARBITRA-
TION, &c.

even before they will be proposed in Court, especially when the party interested would wish any deviation from what are called "*the usual terms*," which, at *Nisi Prius*, are a reference of "the cause and all matters in difference (or the former alone) *on the usual terms*," which means, that the costs of the cause shall abide the event, and that the costs of the reference and award shall be in the discretion of the arbitrator; and in special jury causes it is usual to provide expressly "that the costs of the special jury shall be in the discretion of the arbitrator." The terms "abiding the event" mean, that if the arbitrator shall award that the *verdict* shall be for the plaintiff, then he shall have the costs of the action, and *vice versa* as regards the defendant; and that as regards the costs of the reference and the award, the arbitrator may direct either party to pay the whole, or each pay half; or, to avoid the trouble and expense of taxation, that each party shall bear and defray his own costs of the reference, and pay half the expenses of the arbitrator and of his award. In general, when the plaintiff or defendant was clearly right in his proceeding or resistance of the claim, it would follow that he should be entirely indemnified from any expenses, by awarding that the whole shall be paid by the opponent. But where each party has been in a degree to blame, as by suffering accounts to become intricate, or by unnecessarily delaying or increasing the expenses of the arbitration, then with propriety each party ought to bear a proportion of such expense; and in general the award should be framed accordingly. Parties, when submitting to a reference, should calculate upon such probable result, and if they would object, must stipulate accordingly, and expressly control the arbitrator's powers.

Must stipulate expressly that submission shall be made a rule of Court.

The principal point to *provide* for in agreements, bonds, and deeds of reference, is *against the power of revocation*, for which purpose the statute 9 & 10 W. 3, c. 15, s. 1, requires that there be *an agreement in writing* to refer the controversy, suit or quarrel, to the award or umpirage of some person or persons; and, *secondly*, that such agreement or condition of the bond do *also stipulate that the submission of the parties shall be made a rule of a Court of Record*. The 3 & 4 W. 4, c. 42, s. 39, we have seen, is to the like effect. If it be not *in writing*, the agreement is not within the act; (a) and an agreement not strictly of *reference*, but as regards any other matter, is not within the acts; (b) and unless there be an express stipulation *incorporated*

(a) ——— v. *Wills*, 17 Ves. 421.

7 Moore, 466, S. C.

(b) *Steers v. Harross*, 1 Bing. 133 ;

for making the submission a rule of Court, the statutes would not apply, and the reference would be valid only at common law, and therefore revocable. But a consent that the *award* shall be made a rule of Court has been considered as equivalent to an agreement that the *submission* shall be so made. (c) And if such a stipulation has *originally* been introduced, then although advisable, yet it is not strictly necessary that it should be again introduced in an agreement to extend the time, it being presumed that the parties therein intended to enlarge the original power with all its incidents. (d)

CHAP. III.
OF REFERENCES
TO ARBITRA-
TION, &c.

If the submission is to be by *an agent* or person acting on behalf of *another party*, care must be observed that the submission be framed accordingly, and so as to avoid personal liability on the part of the *agent*. (e) But where the reference is by an agent in the character of treasurer for a company under an act of Parliament, he will not in general incur personal liability to perform the award; (f) and it has been considered that persons referring as *trustees*, are not to be personally liable; but that must depend on the terms and object of the reference. (g)

Submission by
an agent or
trustees, how
to be framed.

If *executors* should refer, we have seen that the submission should be so framed as to protect them from personal liability, unless they have assets. (h) So *assignees of a bankrupt*, when they refer a claim upon the estate, should take care to provide that the sum awarded, whether for debt or expenses, shall be only payable out of the assets, and not by them personally; (k) and if *several parties* have distinct interests or liabilities, then although they may concur in one reference, yet it should be expressly provided that each shall only be separately liable for his own default, and not also for other parties. (l)

Submission by
executors, as-
signees, &c.

If it be intended to *limit the powers of the arbitrator*, and prevent him from making a *general* award, and to require him to state any facts or point of law, care must be observed to introduce express words in the submission to that effect; and it should not state merely that the arbitrator shall be *at liberty*,

Power of arbi-
trator limited.

(c) 3 East, 603; 2 Bos. & P. 444; 1 Ld. Raym. 674; 1 Salk. 72; Beames, 55. accord.; 2 Stra. 1178, contra.

(d) 5 East, 189; 8 East, 13, accord.; and 8 T. R. 87, contra.

(e) *Bacon v. Dubarry*, 1 Lord Raym. 246; as thus: "That the said A. B. "as agent for E. F., duly authorized, but "not in any respect to subject him the "said A. B. to any liability whatever, "agrees that all differences between the "said B. F. and G. H. shall be, and the

"same are hereby referred and sub-
"mitted to the arbitrament, &c."

(f) *Corpe v. Glynn*, 3 B. & Adolph. 801.

(g) 3 Esp. R. 101; Tidd. 9th ed. 836; but see 2 Chitty's Rep. 40; ante, 78, note (c.)

(h) *Ruddell v. Sutton*, 5 Bing. 200, ante, 77.

(k) Ante, 77, 78.

(l) *Munsell v. Burridge*, 7 Term. R. 352; *Genner v. Tinker*, 3 Lev. 24.

CHAP. III.
OF REFERENCES
TO ARBITRA-
TION, &c.

but peremptorily that he *shall* state what is required; (*k*) and if it were merely that he shall state any point of *law* that may be raised, it would suffice if his award merely state the abstract questions of law without reference to any particular state of facts, and to certify that he has overruled them, and the Court would refuse to direct him to set forth the facts; and therefore the submission should, in a case of this nature, peremptorily require a specific statement of the *facts*. (*l*) But "the words shall or may state," &c., have been considered imperative on the arbitrator to comply.

Other suggest-
ed terms.

The *other terms* of reference are entirely matter of particular agreement, but frequently require much precaution and consideration. In the subscribed note a few stipulations are stated so as to guard against inconveniences, which, it seems from different decisions, have occurred for want of proper terms having been inserted in the agreement or order of reference; and such of them as may be applicable to each particular case may readily be adopted, and the rest rejected. (*m*)

(*k*) *Ante*, 76, 78, and see Form in note, *post*, 90.

(*l*) *Jag v. Byles*, 3 Moore & Scott, 86, and *ante*, 76, 78; see forms of submission, *post*, 90.

Agreement of
reference not
under seal.

(*m*) "Memorandum of an agreement made this — day of —, A. D. —, between *A. B.*, of —, and *C. D.*, of —, as follows; viz." &c. [state recitals and terms as below, or proceed at once to the statement of the agreement to refer, as below; but to bind *heirs*, and afford a preference in the administration of assets by an executor or administrator, a reference by deed or bond is preferable.]

The like by
cross bonds.

If the submission be by cross bonds, the obligatory part is to be in the form of a common money bond; and then the condition should recite the differences, and the agreement to refer, as in the following indenture; and the *condition* should be, for abiding by the award to be made, in substance as in the indenture.

Indenture of
reference.
Recital of ge-
neral or parti-
cular griev-
ances.

"This indenture, made the — day of —, A. D. —, between *A. B.*, of —, and *C. D.*, of —. Whereas differences and disputes have arisen and are depending between the said *A. B.* and *C. D.*," [if these be special, and it is important expressly to limit the power to award upon one or more particular points, then it may be advisable here to specify them, and afterwards to limit the power expressly to the recited differences; but if the reference be general of all matters in difference, then no specification will be necessary, and the agreement or deed should immediately proceed thus]: "Now this indenture [*or agreement*] witnesseth that the said *A. B.* and *C. D.* do, and each and every of them doth, each for himself severally and respectively, and for his several and respective *heirs*, executors, administrators, and assigns respectively, covenant, promise and agree to and with each other, his *heirs*, executors, administrators and assigns, well and truly to stand to, obey, abide by, observe, perform, fulfil, and keep the award, order, arbitrament and final determination of *G. H.*, of —, of and concerning the premises aforesaid, or any thing in anywise relating thereto; and also of and concerning all and all manner of action and actions, cause and causes of action, suits, bills, bonds, specialties, covenants, contracts, promises, accounts, reckonings, sums of money, judgments, executions, extents, quarrels, controversies, trespasses, damages and demands whatsoever, both at law and in equity, at any time heretofore, up to and upon the day of the date hereof, had, made, moved, brought, commenced, sued, prosecuted, committed, or depending by, or between the said parties, or any of them, and in particular of and concerning a certain cause now depending between the said *A. B.* and *C. D.* in the Court of —, and all other matters in difference between them, up to the day of the date hereof, inclusive hereof, so as the said

Stipulation to
abide by award.

Power to en-
large.

If the reference be directed by a rule or order of the Court or a Judge, it may be amended by inserting such omitted matters

CHAP. III.
OF REFERENCES
&c.

award of the said *G. H.* be made under his *hand*, on or before the — day of — next, or such further time or times as the said *G. H.* shall from time to time appoint by indorsement written thereupon, and signed by him : And it is also agreed by and between the said parties, that these presents shall be made a rule of one of His Majesty's Courts of Law or Equity, at Westminster, to the end that the said parties respectively may be finally concluded by the said arbitration, and award thereon, pursuant to the statute in such case made and provided : Also that the said parties or either of them and their witnesses may be examined on oath before the said arbitrator : Also that all the costs and charges of the said action shall abide the event, but that the costs and charges attending the present arbitration and award to be thereupon made, shall be in the discretion of the said arbitrator. In witness whereof they have hereunto set their hands and seals respectively, the day and year above written.

"Signed, sealed, and delivered, being }
first duly stamped, in the presence of us }

A. B. (L. S.)
C. D." (L. S.)

Amendments
of submission.

Agreement that
the submission
shall be made a
rule of Court.

Parties and
witnesses to be
examined on
oath.

Costs of action
to abide the
event. All
other costs in
discretion of
the arbitrator.

"And that the award of the said arbitrators, or any two of them, whether expressed to be made by all or some, but signed only by two, shall be binding on the said parties." *Thomas v. Harrup*, 1 Sim. & Stu. 524.

Proviso that an
award signed
by two or three
arbitrators to
suffice.

"And that the said arbitrators or the major part of them shall, either before or after they have disagreed, or become unable to make their award in the premises, choose, nominate, and appoint, in writing under their hands, one or more other arbitrators or umpires or umpire, in the premises ; and that provided such fresh arbitrator, umpires or umpire shall have attended the meetings or parts of meetings before the said arbitrators, as shall in the judgment of such fresh arbitrators, umpires, or umpire, be sufficient, with the assistance of the minutes of evidence taken by the said arbitrators, or any one of them, to enable such umpires or umpire to make a just and correct award ; then it shall and may be lawful for them and him, to make their or his award or umpirage accordingly, after having had or without having had, any further meeting, and at any time within one month after the said arbitrators shall have declined proceeding further in the matter of the said reference, or within such further time as the said fresh arbitrators, umpires or umpire, shall in writing signed by them or him appoint." *Bates v. Cook*, 9 Bar. and Cres. 407.

Power to ap-
point fresh ar-
bitrators or
umpire, and
power for the
latter to award
without a fur-
ther meeting.

"On or before the — day of —, or on or before such further or ulterior day or days as he the arbitrator shall or may from time to time appoint, in writing signed by him, and indorsed on this agreement [or 'order,'] or upon any rule or order made thereupon before the time so limited shall have expired, whether or not any further rule or order shall have been made thereupon ; or at any time before he shall have certified in writing, signed by him, that he declines proceeding any further upon the said reference, or at any time within one month next after notice in writing, signed by one of the parties, that he will not consent to any further delay in making the award, unless the Court or a Judge shall think fit to direct that the time shall be extended for a further time named in the rule or order for that purpose. Provided nevertheless, that the said arbitrator shall not enlarge the time for making his award in the premises beyond the — day, without a Judge's order for that purpose having been obtained on or before that day." See necessity for or use of these stipulations, *Mason v. Wallis*, 10 B. & Cres. 107 ; and see *Halden v. Glassco*, 5 B. & Ald. 390 ; *Leggatt v. Finlay*, 6 Bing. 255 ; 1 Young & J. 16. Too frequently the terms of submission very unnecessarily require the expense of a rule or successive rules, and from want of attention in obtaining the rule or order in time, the arbitrator's power is determined. The best course is to avoid the necessity for any rule.

Extensive pow-
er to enlarge.

"To whom the cause and all matters in difference between the said parties are referred, with liberty and power to the said arbitrator to regulate the future enjoyment, management, care, and cleansing of a certain stream or watercourse called —, or by some other name, by the said parties or either of them ; and also with liberty and power to the said arbitrator, in case he shall find that any matter complained of by either party, hath been or is illegally erected or placed, or continued, then he shall or may award when and in what manner, and by whom, and at whose expense, the same or any, and what part thereof, shall be abated or removed, or shall or may be permitted to continue either in part or

Power to regu-
late or fix the
terms on which
a nuisance may
be continued.

CHAP. III.
OF REFERENCES
TO ARBITRA-
TION, &c.

Order of refer-
ence of an in-
dictment for
nuisance.

Stipulation
against revoca-
tion by death,
marriage,
bankruptcy,
&c.

Stipulation that
the death of
the arbitrator
shall not re-
voke, &c.

Power to exa-
mine parties
and witnesses
on oath.

Stipulation to
state a candid
and explicit ac-
count of claims,
and produce
documents.

Stipulation that
the arbitrator
shall expressly,
upon the face
of his award,
*adjudicate sepa-
rately* upon
each claim.

Stipulation that
the arbitrator
shall if required
state the evi-
dence and
points of law
on the face of
his award.

as were incident to the substance of the agreement of the parties; (n) but not to substitute A. for B. as an arbitrator. (o)

in the whole, and for what time, and on what terms." *Rhodes v. Haugh*, 2 B. and Cres. 345.

"And if the said arbitrator shall determine that there has been a nuisance, and shall be of opinion that the prosecutors are entitled to costs; then the said defendant agrees to consent to a verdict of guilty, and to pay the costs of the said prosecutors, and also of the said reference and award; and that it shall also be in the discretion of the said arbitrator, to determine and direct that the said defendant shall pay the costs of the special jury, and if he shall so award, then the said defendant agrees to pay the same." See necessity, *R. v. Moate*, 3 B. and Adolp. 237.

"And it hereby agreed that in case of the death or bankruptcy, or marriage, or any illness or malady of the said parties, or either of them, it shall be lawful for the said arbitrator, nevertheless, to proceed and make his award in the premises, and that the same shall be binding on the survivor or survivors, and also upon the heir, executor, or administrator, and representative of each party, and also on his assignee, trustee, or committee, so far as the same can or may be by law; but so far only as to affect any assets legally applicable to the satisfaction of any sum or costs awarded, and not to bind or affect any such heir or representative personally, or other person, or to subject either of the said parties to liability from which he would have otherwise been discharged." 3 B. & Cres. 144; 6 B. & Cres. 255. *In matter Joseph v. Webster*, 1 Russ. & M. 496; see also *post* 102, 3.

"And it is hereby agreed, that in case the said arbitrator shall die, or become unable, or shall decline to proceed in the said reference, the power to arbitrate on the premises shall not thereupon abate or determine, but that it shall be lawful for the Court of — or one of the Judges thereof, or the Clerk of the Rules thereof for the time being, to nominate and appoint one or more arbitrators to award upon the premises, in lieu of the said hereby named arbitrator, and that the agreement and the award thereupon shall extend and apply in all respects as if such person had been the original arbitrator." See *post*, 103, n. (k)

"With liberty to the said arbitrator to examine the said parties and their witnesses upon oath, or otherwise, as he shall think fit." *Warne v. Bryant*, 3 B. & Cres. 590. See the necessity for this, 3 & 4 W. 4, c. 42, s. 41; *ante*, 83.

"And it is hereby agreed, that each of the said parties shall and will, at least two days before the first or any subsequent meeting appointed by the said arbitrator, produce and deliver to him a full, true, just, candid, and clear account or statement in writing, of all and every item of his claim, or set off, or advance, or payment or deduction, and shall and will thereby and therein admit such items on the other side as he knows to be correct, and endeavour to reduce the enquiry before the said arbitrator to as few items as may be possible; and that in default of either of the said parties so doing, then that the said arbitrator shall and may award such costs or sum of money, as stipulated damages in lieu of costs, to be paid by the party guilty of neglect in the premises, as he may think fit. And further, that each of the said parties shall and will, at each and every meeting before the said arbitrator, without any previous notice so to do, produce, and leave in the possession of the said arbitrator until he has made his award, all and every document whatever, that directly or indirectly relates to the matters in difference."

"And for the more explicitly, satisfactorily, and permanently adjusting and determining all and every matter of dispute or difference between the said parties that shall or may be brought before the said arbitrator, it is hereby agreed that the said arbitrator shall, at the request of the said parties, or either of them, when reasonably required so to do by writing signed by the party, and delivered to the said arbitrator at least twenty-four hours before he shall make his award, in and by his said award, state and separately adjudicate upon every claim made by or on the behalf of either party, and state whether he allows or disallows the same."

"And it is hereby expressly declared and agreed that the said arbitrator shall, at the instance and request of either of the said parties, state in explicit terms, upon the face of his award, the exact *evidence and facts*, in respect whereof either of the said parties shall think fit to state or raise any legal objection or question, whether upon the admissibility or competency of any evidence or witness, or upon

(n) 5 Taunt. 662; 4 Taunt. 254; but see 2 Chit. R. 29; 5 Moore, 167.

(o) *Res v. Bingham*, 1 Crompt. & J.

245. As to a submission obtained by fraud, see *Sackett v. Owen*, 2 Chit. R. 39.

Although in order to make the submission a rule of Court, an affidavit of its execution may be made at any time after, and the making of such affidavit may be enforced, (p) yet it is in general most prudent to obtain the same *at or immediately after* the

CHAP. III.
OF REFERENCES
TO ARBITRA-
TION, &c.

Secondly, The affidavit of the execution of the agreement or deed of reference.

any question of law touching or in any wise relating to the interests of either party, respecting which his the said arbitrator's award is to be, or might or ought to be made, together with the said arbitrator's opinion thereupon, and in so clear and distinct a manner as to enable both or either of the said parties to obtain the opinion of the Court of —, touching such question or point of law, or the due effect to be given to such evidence, or to the opinion or decision of the said arbitrator, or the result and validity of his award in the whole or in part." See the necessity for this stipulation, *Jong v. Byles*, 3 Moore and Scott, 86; *ante* 87, 88.

"And it is hereby further agreed, that if either party, by affected or unreasonable delay or otherwise, shall hinder, prevent or impede, or endeavour to hinder, prevent or impede the said arbitrator from or in making his award so soon as he ought, or otherwise might do, he or she shall pay such costs or sum of money as the said arbitrator or the said Court shall award or adjudge right and just." *Watson*, 24; *Aston v. George*, 2 B. & Ald. 395; 1 Chit. R. 204, S. C.

Power to award costs of delay.

"And it shall and may be lawful for the said arbitrator, at any appointed meeting or hearing by him had to proceed at and upon the appointed time, *ex parte*, to subject the party thereupon absent, or not adducing reasonable evidence sufficient to occupy the time of a meeting of two hours duration, to any reasonable expences, the amount of which he shall or may by his award fix and direct to be paid, or he may direct that the same shall and may be taxed by the proper officer of the Court, and to be paid by such party when so taxed." The 3 & 4 W. 4, c. 42, s. 39, expressly requires the arbitrator to proceed *ex parte* after revocation, and declares that the award shall be valid.

Power to proceed *ex parte*, in case of absence, or not bringing forward evidence.

"And it is further agreed, that if either of the said parties shall fail or neglect to attend before the said arbitrators or umpire, at any meeting appointed by them or him, after three days' previous notice shall have been given or sent to the said parties thereof, then the said arbitrators or umpire shall be at liberty to proceed from time to time *ex parte*, and to make their or his award; and that the party absent shall at most be entitled at any subsequent meeting to require the arbitrator to state to him the substance of the evidence adduced when he was absent, and in case he shall desire to cross-examine any witness who has given any evidence whilst he was absent, he shall, at his own expence, obtain the attendance of such witness; but the opponent shall nevertheless give him facilities in obtaining the presence of such witness, and the absent party shall, at all events, pay every expence and increase of charge occasioned by his absence."

Power to proceed *ex parte*, in a fuller form.

"And it is hereby agreed that the said — shall not be personally liable to pay any sum of money or costs, under or by virtue of the award to be made by the said arbitrator, further or beyond the assets he hath or shall or may have, as the executor of Mr. — and legally applicable to the satisfaction thereof; nor unless the said arbitrator shall, by his award, expressly find and decide that after paying all debts of a higher nature or degree, the said — hath assets in his hands sufficient to pay the sum, if any, found due by the said award, or some and what part thereof, together with the costs of the said action and of the reference and award, to be paid as the said arbitrator shall direct." See necessity for this qualification, *ante*; and *Ruddell v. Sutton*, 5 Bing. 200. *In matter Joseph and Webster*, 1 Russ. & M. 496. *In re Wansborough*, 2 Chit. R. 40.

Agreement to prevent an executor from being liable without assets.

"And it is hereby agreed that the said arbitrator may award and direct such proceedings either as relate to pleading or practice, or the executing of a warrant of attorney to confess judgment, or signing a cognovit, to be had, and such judgment to be entered, as he shall think fit, to secure the payment of all sums and costs by him awarded to be paid, and that each of the said parties will adopt such measures as shall be necessary or proper in that behalf, so as to observe such direction as nearly as may be." See *Hutchinson v. Blackwell*, 8 Bing. 331; 1 M. & S. 513. A submission to refer a cause and the issue therein to a barrister, does not authorise him to award a verdict to be entered: and *semble*, that unless a jury has been empanelled and sworn, it would be improper to award a *feigned verdict* to be entered, and that the only course would be to award that judgment be entered by confession, and *relicta verificatione* of the plea, or *nolle prosequi* against a plaintiff.

Power to award the entry of a judgment to secure payment.

CHAP. III.
OF REFERENCES
TO ARBITRA-
TION, &c.

instrument has been signed, and the subscribed form is proper for the purpose; (q) and there should be a duplicate affidavit annexed to each part of the instrument of reference, and sworn, so that each party may have one to use.

Thirdly, Of making the submission a rule of Court.

As the statute speaks only of Courts of *Record*, it has been considered that the Court of Chancery, which is not in strictness of record, is not within the act; (r) but the second section of the 9 & 10 W. 3, c. 15, imports that the Legislature intended to include the superior Courts of Equity; and in practice, Courts of Equity have long assumed concurrent jurisdiction. (s) And in equity as well as at law, a submission to reference may be made a rule of Court as well after the award has been made as before. (t) It may also be made a rule of Court in vacation as well as in term. (u) But when the reference is by agreement or deed, it is advisable to make it a rule shortly after the agreement has been entered into; because as an affidavit of the due execution of the agreement is required in order to make the same a rule of Court, death or absence, or refusal of the witness to make the requisite affidavit, might occasion at least delay, if not difficulty (v) Besides, when the parties and witnesses know that they are to act and give evidence under a rule already obtained,

Stipulated damages to be paid in case of unreasonable delay by either party.

“ And in case either of the said parties shall by any unreasonable delay in proceedings or otherwise, hinder or prevent the said arbitrator from making his award, on or before the said — day of —, or any time enlarged by him, then he shall pay to the other the sums following, that is to say; if the said defendant shall occasion such hindrance or prevention, then he shall pay to the said plaintiff the sum of £ — as being the estimated and stipulated and hereby agreed amount of the sum claimed by the said plaintiff, together with the costs which the said plaintiff has and probably will incur; and if the said plaintiff shall occasion such hindrance or prevention, then he shall pay to the said defendant the sum of £ —, being the estimated, stipulated, and hereby agreed amount of the expences and costs which the said defendant hath and probably will incur in his defence of the premises. And that it shall and may be lawful for the said arbitrator to award within any reasonable time hereafter, that the said sum shall be paid accordingly; and also to award and direct what, if any, judgment shall be caused to be signed or entered, to secure the due payment thereof.

Form of affidavit of signature to the agreement of reference by attesting witness.

(q) In the Court of —.
A. B., of, &c. clerk of G. H., of —, attorney, maketh oath and saith, that he was present at the time of the signing the agreement hereunto annexed [or of the signing, sealing and delivery of the bond “or deed” hereunto annexed]; and that C. D., of —, and E. F., of —, therein mentioned, did duly sign [or seal, and as his and their act and deed deliver] the said agreement [or bond or deed] in the presence of this deponent; and that the names of C. D. and E. F., set and subscribed to the said agreement [or bond or deed] are respectively the proper hand-writing of the said C.

D. and E. F., and that the name of A. B., set and subscribed as the witness thereto, is of the proper hand-writing of this deponent. A. B.

[Sworn, &c.]

(r) Tidd. 9th ed. 821; but citing 2 Mad. Ch. Pr. 713.

(s) 2 Mad. Ch. R. 713, 4. *Post*.

(t) *Cheede v. Lequesne*, 2 Ves. 315; *Pownal v. King*, 6 Ves. 10; *Symes v. Smith*, 5 Mad. Rep. 74, overruling *Spellinge v. Carpenter*, 3 P. Wms. 361.

(u) 5 B. & Ald. 217; Tidd. 836.

(v) 1 Stra. 1; 10 Mod. 322, S. C.; Barnes, 58; 1 Price, 308; 1 Chit. R. 743.

and which might be promptly acted upon by attachment, they may be the more disposed to act correctly. Where four actions, three in the Exchequer and one in the King's Bench, were referred by an agreement of reference, which had been made a rule of the King's Bench under a clause therein, empowering the parties to make it a rule of the King's Bench or Exchequer, the Court refused to allow the agreement to be made a rule of that Court; and that Court appears to have considered that the statute 9 & 10 W. c. 15, only authorizes the making an agreement to refer a rule of *one* Court, and not of more than one. (*w*)

If the arbitrators have power to appoint another arbitrator, or an umpire, in case they should *disagree*, they may immediately, and before any disagreement, appoint their umpire; (*x*) and it seems better to make the appointment before disagreement, as they are more likely to concur in a judicious choice before than after disagreement, and after which they might not be able to concur, and by which any award might be prevented. It has been further held, that in such a case the circumstance of the arbitrator, or even of a stranger, joining with the umpire in making the award, did not prejudice. (*y*) The refusal of one umpire to accept the appointment, does not preclude the arbitrator from appointing another within the time limited; (*z*) and although an umpire cannot in general make his award until after the original arbitrators have refused to proceed, yet he may do so at any time after they have declared that they will not make an award. (*a*)

Fourthly, Ap-
pointment of
umpire.

In general, the appointment of another arbitrator, or of an umpire, must be the result of the exercise of sound discretion, and not of chance, as tossing up or drawing lots; (*b*) and this although the original arbitrators had each chosen and named a proper person as an umpire, and then tossed up whose nominee should be appointed; for both ought *mentally* to have concurred in the selection. (*c*) The form of appointing an umpire may depend on the terms of their power, but may in general be as subscribed. (*d*)

(*w*) *Wimpenny v. Bates*, 2 Crompt. & Jervis, 379; and *post*, as to Courts of Equity.

(*x*) *Bates v. Cooke*, 9 B. & Cres. 407.

(*y*) And see 4 Taunt. 232.

(*z*) 11 East, 369, note (*a*).

(*a*) 3 M. & S. 559.

(*b*) *Ford v. Jones*, 3 B. & Adolph. 248; *Young v. Miller*, 3 B. & Cres. 407; *In re Cassell*, 4 Man. & Ryl. 555; 16

East, 51.

(*c*) *Id. ibid*; *Young v. Miller*, 3 B. and Cres. 407.

(*d*)

Between { *A. B.*
and
C. D.

We *G. H.* and *I. K.*, the within-named arbitrators, do by virtue and in pursuance of the powers within contained and in us vested, hereby nominate

Form of arbi-
trator's ap-
pointment of
an umpire.

CHAP. III.
OF REFERENCES
TO ARBITRA-
TION, &c.

Fifthly, The meetings, and securing the attendance of witnesses. Necessity or expediency of written appointments of meetings.

The principal difficulty incident to references to a barrister, especially when they are to be attended by counsel for each party, is the securing the *punctual* attendance of all requisite parties during a meeting of *useful duration*, so as really to dispatch with effect some considerable portion of the case.

It was always advisable, and since the enactment in 3 & 4 W. 4, c. 42, s. 40, would be necessary, in order to bring a party or witness into contempt for his non-attendance before an arbitrator, to serve upon him, together with a rule or order therein mentioned, "an appointment of the time and place of attendance, in obedience to such rule or order, signed by one at least of the arbitrators, or by the umpire before whom the attendance and production of documents is required." Upon the acceptance of the reference, the arbitrator should be required to *appoint* the first and sometimes even subsequent meetings; and as adverse witnesses cannot be required to attend at more than *two consecutive days*, the appointment and order for their attendance should be framed accordingly. (e) The form of the appointment of the first or subsequent meeting may be to the subscribed effect, fixing the precise time, to prevent any supposition that it is only nominal, as occurs in some descriptions of meetings; and all duplicates of the appointments should be signed by the arbitrators and delivered to the respective attorneys. If the appointment should be *after* and *pursuant* to a Judge's order or rule requiring the attendance of a witness, then it should refer to the order and the statute.

Hearing, and production of evidence at the *first* meeting.

If it be expected that there will be more than one meeting, then it may be advisable, unless death or absence is to be apprehended, not to produce adverse or expensive witnesses at the *first* meeting, but principally documentary evidence, and witnesses who may be in attendance, and whose testimony and

and appoint Mr. L. M., of —, the third person or arbitrator [or "umpire"] within mentioned, he having been selected and chosen by us for that purpose, to act and award and decide as within directed. Witness our hands this — day of —, A. D. —

G. H.
I. K.

(e) Sect. 40 of 3 & 4 W. 4, c. 42.

Between { A. B.
&
C. D.

I appoint Monday, the — day of — instant, at seven o'clock in the evening precisely, at my Chambers, No. —, Paper Buildings, Temple, for proceeding on this reference. Dated

this — day of — A. D. —

G. H., Arbitrator.

To Mr. A. B. and C. D.,
and their respective Attorneys.

Between { A. B.
&
C. D.

I appoint —, the — day of — instant, at — o'clock in the evening *precisely*, at —, *peremptorily* to proceed upon and conclude this reference; and I hereby give notice that in case of the non-attendance of either party, I shall nevertheless proceed and immediately make my award according to the statute in that case made and provided. Dated this — day of — A. D. —

G. H., Arbitrator.

Arbitrator's appointment of the first or other meeting.

And also a form of a peremptory and final meeting, and of the intention to proceed *ex parte*.

cross-examination will be short and rapidly disposed of. Because at such first meeting admissions may be made and other arrangements entered into so as to dispense with the attendance of adverse or expensive witnesses. The attornies for each party should examine and arrange their evidence and witnesses before the first meeting, in the manner hereafter directed to be observed in preparing for trial, and should evince before the arbitrator as much candour as justice may admit, and never make technical objections unconnected with the equity of the case, unless where by the terms of the reference, it will be imperative on the arbitrator to give them effect. (f)

For the sake of the parties, and to avoid the increase of expense, when once a meeting has been fixed, it is the duty of the arbitrator to proceed, unless serious illness should prevent, and the attornies on both sides should so arrange that an adequate number, and yet not too many witnesses or evidence should be at hand, so as to prevent any meeting from being abortive; and in case the counsel for the parties should be unable to attend at the appointed time, the attorney himself should be fully prepared to proceed at least with documentary evidence, if not with the examination of witnesses. There is a strong moral duty in this respect to avoid the increase of fees and other avoidable expense, which constitutes one serious ground of objection to references. The 3 & 4 W. 4, c. 42, s. 40, contains ample powers to enforce the attendance of witnesses, and care should be observed to take all proper measures, and in due time, to secure their attendance at such meeting, and in the manner directed by the statute, viz. by obtaining a proper *rule or order* of a Judge, commanding the attendance of a party and the production of *documents which must be described* in the rule or order, and by further obtaining a *written appointment* of the time and place of attendance, signed at least by one of the arbitrators, if several, or the umpire, and that each of them be served in reasonable time before the meeting. There must also be a due *tender* of expenses, and the witnesses cannot be required to attend more than two consecutive days, to be named in the Judge's order.

Meetings to be absolutely effectual.

To avoid all pretence of mistake, it will be advisable for the attorney of the party whose interest it is to press forward in the reference, besides the notice usually given by the arbitrator of his appointment of the next meeting, made in the presence of the parties, to obtain from the arbitrator his written and signed appointment for each *successive meeting*, and to serve a copy

Notices of the appointed meetings.

CHAP. III.
OF REFERENCES
TO ARBITRA-
TION, &c.

upon the *opponent's attorney* in due time, at least two or three days before the named day, and refresh the opponent's memory on the day before, as to the precise hour of attendance; and a formal notice should at all events be served of any meeting intended to *be final*. This will avoid all pretence of misapprehension, which sometimes is available for the purpose of delay; (g) and further, it would be advisable, early on the day before the appointed time, to leave a copy of the appointment at the chambers of the respective counsel retained to attend upon the reference. If the arbitrator proceed without proper notice, his award might be set aside. (h)

*Sixthly, En-
largement of
the time.*

In general, by the terms of the reference, the arbitrator has particular and express power to *enlarge the time* for making his award; and a power to enlarge without express limitation, enables the arbitrator to enlarge several times, and from time to time. (i) To prevent accident and forgetfulness as to the time or mode of enlargement, this should be as general and comprehensive as possible; for if it be precise and limited, it must be specially pursued; and therefore when, by a judge's order, a cause was referred to an arbitrator, so as he should make his award in writing on or before the 1st day of July then next, or on or before such further or ulterior day as he should appoint in writing under his hand, *to be indorsed on that order, and the Court of King's Bench, or a Judge thereof should order*; and the arbitrator, by indorsement on the order, enlarged the time; but at the time when he made his award, no Judge's order had been obtained ratifying that enlargement: it was held that the arbitrator *had no authority*, and that the award was void. (j) But it might be otherwise, if the parties to the reference proceeded therein without a due enlargement after the limited time without objection. (k) So where a time was limited for making the award by a bond of reference, and before that time had expired the parties, by another deed, enlarged the time, and the award was made within such extended time; it was held, that an action for the non-observance thereof might be sustained upon the bond. (l) But the exercise of this power is in general *discretionary*, and the refusal of an arbitrator to allow sufficient time, although it might be ground for a motion to set aside his award, could not

(g) *Dodington v. Hudson*, 1 Bing. 384.

(h) Salk. 71; *Anonymous*, 2 Chitty's R. 44.

(i) 1 Taunt. 509; 4 Taunt. 658; 2 Chit. R. 45.

(j) *Mason v. Wallis*, 10 Bar. & Cres. 107; but see 1 M. & S. 1, *contra*.

(k) *Leggett v. Finlay*, 6 Bing. 255; Young & J. 16.

(l) *Greig v. Talbot*, 2 Bar. & C. 179.

be pleaded in answer to an action for the breach. (m) Where a verdict has been taken for a named sum, subject to an award to be made by a certain day, merely as to the amount of damages, and the arbitrator accidentally let the day pass without making his award, and the defendant's attorney would not consent to the time being enlarged, the Court granted liberty to the plaintiff to enter up judgment and issue execution forthwith, for the whole amount of the verdict, unless the enlargement were consented to; though at the instance of the Bail they ordered that no execution should issue against them before a certain time, when it appeared that the defendant, who was abroad, would probably be in England. (n) But where a verdict had been taken at the Spring Assizes, subject to a reference, and the award to be made before the 16th of April, and the plaintiff's attorney neglected to obtain the Nisi Prius order until after the time had expired, the Court refused to let the plaintiff proceed on the verdict, although the defendant declined to submit to a new order of reference on the former terms, and left the plaintiff to proceed again to trial. (o)

As a measure of precaution, it is recommended that the arbitrator, when he has power to enlarge, do exercise it *at once for so long a time as to secure abundance of time to hear and determine upon the case*, and that in the most comprehensive terms, so as to avoid the possibility of the determination of his authority by effluxion of time, and which could not preclude him from making his award at an earlier day; the subscribed form would suffice. (p)

Although the arbitrator, especially when he is a barrister, is invested with the functions of a Common Law and Equity Judge and of a Jury, and may make his award according to equity and conscience, without regard to the strict rules of law, either as respects evidence or the rights of the parties, yet in most cases, it is considered most expedient to observe the ordinary rules of evidence and law; and therefore the proceed-

Seventhly,
The proceedings before the arbitrator. (q)

(m) *Grazebrook v. Davis*, 5 B. & Cres. 534. As to setting aside award on ground of refusal to enlarge, see *Post*.

(n) *Taylor v. Gregory*, 2 B. & Adol. 774; and see *Wallis v. Kelly*, 1 B. & Cres. 68. In general, however, the plaintiff must proceed again to trial, unless an absolute verdict in his favour has been taken. *Hall v. Phillip*, 9 Bing. 89.

(o) *Doc v. Saunders*, 3 B. & Adolp. 783.

(p)

Between { A. B.
&
C. D.

I, G. H., the arbitrator between the said parties, do, in pursuance of the power given me by the terms of submission, enlarge and extend the time for making my award herein until the day of —, A. D. —, and until I have made a perfect award upon the matters referred. Dated this — day of —, A. D. —

G. H.

(q) As to irregularities in the arbitrator's proceedings, see *post*, as to setting aside an award.

CHAP. III.
OF REFERENCES
TO ARBITRA-
TION, &c.

ings before him should in general be conducted precisely as in a court of law, viz., by first hearing the statement of the counsel for the party who has to establish the affirmative, with his evidence delivered *vivá voce*, avoiding leading questions, precisely as in Court, and then the statement of the counsel for the opponent with his evidence, conducted in like manner; and then, in cases of importance, the counsel on each side should make their observations on the whole case, on behalf of their respective clients. Sometimes, the arbitrator having previously received the statements in writing of each party, considers it unnecessary to hear any statements of counsel, and to save time, recommends the waiver even of observations; but in general, unless each party and his counsel is in full possession of the particular claims of his opponent, it may be essential that the statement should be made *vivá voce*, so as to prepare the opponent to cross-examine the evidence of his adversary. Besides, the arbitrator may with propriety require a reciprocal statement, and a declaration of what particular items are admitted or disputed, with an intimation, that if there be any useless dispute upon items afterwards clearly established, he shall feel it his duty to award that the party occasioning the waste of time and expense, in adducing such evidence, shall pay all consequent expences.

Eighthly,
Of enforcing
the attendance
of a witness,
and the pro-
duction of
documents, in
pursuance of
3 & 4 W. 4, c.
42. s. 40, and
of swearing
witnesses be-
fore an arbi-
trator.

Before the recent act, there was no mode or power of compelling the attendance of a witness before an arbitrator, even where he had engaged to attend; (r) and it was at least doubtful whether a witness could be indicted for perjury in respect of any false swearing before the arbitrator; consequently, arbitrators frequently could not proceed with effect. (s) But now any material witness may, on proper application to a Judge or the Court, be commanded by order or rule to attend and be examined before the arbitrator, upon his being served with the same, and a duplicate of the arbitrator's appointment signed by him, and upon being duly tendered a sum sufficient to cover his probable reasonable expenses, *eundo morando et redeundo*; and he may be also ordered to produce any *document* in evidence which a witness could not in general withhold from a Court and Jury; and if he be guilty of false swearing, he may be indicted for perjury. (t) The form of the affidavit to obtain an order or rule, and of a Judge's order thereon, are suggested in

(r) *Wansall v. Southwood*, 4 Man. & Ry. 359; and MS. 16th May, 1829.

(s) 3 Car. & Payne Rep. 419.

(t) See the terms of the enactment, *ante*, 82, 83.

the note, and may, perhaps, assist in any proceedings. (x) It will be observed, that the subscribed form of affidavit supposes

CHAP. III.
OF REFERENCES
TO ARBITRA-
TION, &c.

(x) In the Court of —, [N. B. The title will depend on whether or not there is a cause in Court; if not, there should not be any title excepting as regards the Court. But when there is, then the title would properly be in the cause.]

A. B., of —, maketh oath and saith, that by an agreement in writing, made between him and *C. D.*, and signed by them respectively, they agreed to submit certain differences between them to the award of *E. F.* of —, Esquire, Barrister at Law, such award to be made on or before, &c. next, or such further day as he should appoint; and that in pursuance of a written agreement, contained in the said agreement, to that effect, the said submission hath been made a rule of this Honorable Court, in pursuance of the statute in that case made and provided; and that the said *E. F.* hath accepted, and is proceeding upon the said reference, and hath, according to the said power, contained in the said agreement of reference, duly enlarged the time for making his award thereupon, until the — day of — next, and that the said arbitrator hath duly made and signed an appointment for a meeting upon the said reference before him, at his chambers, situate at, &c. on the — day of — next, at the hour of — precisely, and on the next day, at the same hour, a copy of which appointment, signed by the said *E. F.*, is hereunto annexed, and is signed by the said arbitrator: And this deponent further saith, that *L. M.*, of —, in the county of —, gentleman, is now residing at — aforesaid, in the county of — aforesaid [or if he cannot be found, or keeps out of the way, instead of the above, say, “until the — day of — last, did reside in the county of —, but that he hath left his said residence, and although diligent search and enquiry hath been made to ascertain where the said *L. M.* now resides, his present residence cannot be ascertained, nor doth this deponent know, nor can he ascertain where the said *L. M.* is now to be found; but he hopes and expects that if an order shall be obtained, commanding the attendance of the said *L. M.* before the said arbitrator, he this deponent will be able to serve the said *L. M.* with the same, according to the statute, before the time for making an award in the premises shall have expired;”] and this deponent is informed, and verily believes, that the said *L. M.* hath in his possession, custody or power, an indenture, &c. [here describe the document required, as fully as the nature of the case will admit]; and this deponent further saith, that he is informed and advised, and verily believes, that the said *L. M.* hath been, and is, and will continue to be a material and necessary witness for him the said *A. B.*, touching the matters so referred to the award of the said *E. F.* as aforesaid, and that it is and will be material and necessary that the said *L. M.* should attend and be examined, and give his evidence before the said arbitrator relating to the matters so referred, and should produce in evidence the said document, to and before the said arbitrator, on &c. next, or on the day then next following, or on some other days to be fixed by an order or rule in pursuance of the said statute, and that he the said *L. M.* hath not any just reason for refusing to attend and be examined, or for refusing to produce and have the said document read in evidence as aforesaid, and that he the said *A. B.* cannot safely proceed in the said arbitration without the evidence of the said *L. M.*, and the production and reading of the said document by and before the said arbitrator. And this deponent further saith, that he did on &c. last past, apply to and request the said *L. M.* to attend and be examined as a witness before the said arbitrator, and to produce the said indenture in evidence at the same time, and at the same time caused to be tendered and produced to him the said *L. M.* the sum of —*l.*, which was and is sufficient to cover and defray all the reasonable expenses incident to his compliance with such request, and also a reasonable and proper compensation for loss of time, but the said *L. M.* wholly refused to comply with such request, and declared he could not take any trouble in the premises. [The latter, respecting the applicant's tender and refusal, must necessarily depend on the facts.]

Sworn, &c.

Between { *A. B.*
and
C. D.

Upon reading the affidavit of *A. B.*, and the paper writing and appointment thereunto annexed, I do order and command *L. M.*, now residing at —, in the county of —, and in the said affidavit mentioned, to attend before *E. F.*, Esquire, the arbitrator in the said affidavit and paper writing mentioned, on two consecutive days, that is to say, on Monday, the — day of — next, at seven

Judge's order thereupon, for the attendance of the witness with a named document.

CHAP. III.
OF REFERENCES
TO ARBITRA-
TION, &c.

that the submission has already been made a rule of Court, and which is recommended; but this is not absolutely necessary; and it should seem, that even the appointment of a meeting before the arbitrator, need not precede the order or rule requiring the attendance of the witness; but it is suggested, that it may be most convenient, at the first or subsequent meeting before the arbitrator, to state who are known to be reluctant witnesses, from previous application to them, and to request him to make an appointment of two meetings on consecutive days, allowing reasonable time for afterwards obtaining the order or rule, and serving the witnesses with the same, and together with a separate appointment of the two meetings, signed by the arbitrator, and in time to enable them, without hurry, to prepare for and take the necessary journey. And as an additional precaution *after* the order or rule has been obtained, another appointment, reciting and corresponding with the order or rule, might be made by the arbitrator, and served upon the witness.

Ninthly, Of the arbitrator's swearing the witnesses.

In cases of references at *Nisi Prius*, it is usual to swear all the witnesses then assembled to give evidence before the arbitrator. But if this has been omitted as to one or more witnesses antecedent to the meeting before the arbitrator, the witnesses may be sworn before a Judge, and the *jurats* produced to the arbitrator. But since the recent act, much expense may be saved and facility given under the 41st section, (*u*) which enacts, that when in any rule or order of reference, or in *any submission* to arbitration, containing an agreement that the submission shall be made a rule of Court, it shall be ordered or *agreed* that the witnesses upon such reference shall be *examined upon oath*, then the arbitrator may administer an *oath* to each witness, or take his affirmation; and, in case of false swearing, the crime of *perjury* shall be deemed to have been committed. In these

o'clock in the evening of that day, precisely, and also on Tuesday, the next day, at the same hour, at the chambers of the said *E. F.*, situate at —, being the days, times, and place in the said appointment mentioned; and that the said *L. M.* do then and there submit to be duly sworn and examined upon his oath by and before the said arbitrator, as a witness in the matter of the said reference; and do also then and there duly make answer unto such lawful questions as shall then and there be put to him as such witness by or before the said arbitrator; and I do further order and command the said *L. M.*, at the time and place aforesaid, to produce and give in evidence to and before the said arbitrator a certain document, being, &c. [describe it fully] in pursuance of the statute in that case made and provided; and that the said *L. M.* fail not in the premises, upon pain of his being deemed to have been guilty of a contempt of the said Court. Dated this — day of —, A. D. 1834.

[Signature of the Judge.]

cases, the proper oath or affirmation is to be administered to the witness verbally, as at *Nisi Prius*, and nearly in the same form, excepting that the arbitrator, instead of the officer of the Court, is to require the witness to take into his hand the proper book, (i. e. the *New Testament*, if a Protestant or Quaker, and the *Old Testament*, if a Jew;) and then the arbitrator is to state to the witness the form in the note; and the witness, after signifying his assent, is to kiss the book, which completes the swearing. (v)

CHAP. III.
OF REFERENCES
TO ARBITRA-
TION, &c.

It is very generally provided in orders of reference, that the arbitrator shall be *at liberty* to examine the parties themselves; an advantage for a party, which in some cases he would do well to *insist upon*, by absolutely requiring such examination. There are many cases in which one of the parties may be able justly to prove a sale or loan or a payment, when he has no other evidence of the fact, and his interest ought to affect rather his credibility than his competency. It having, however, been found, that in general the interest of parties has so strongly influenced their minds, and warped their memory, in favor of a fact that really had no existence, especially when connected with conversation, so frequently misunderstood, that they will venture to swear to it, and this really without intending to commit perjury, therefore arbitrators are in general reluctant to exercise *the liberty*, because they anticipate that probably the other party will equally strongly and sincerely deny the other's statement; so that, in reality, little or no light is thrown upon the point. This, however, is entirely matter of discretion. There is certainly no foundation for the common supposition, that under such a power, a party has no right to require the arbitrator to examine him, to give evidence *in his own favor*, but only to expose him to cross-examination; certainly, no such rule prevails in law or justice; and, accordingly, it has been expressly held, that where by an order of *Nisi Prius* a cause was referred to an arbitrator, with liberty to him, *if he should think fit*, to examine the parties to the suit; he, the arbitrator, might examine a party to the suit in support of his own case. (w) And the Court refused to set aside an award, on the ground that the parties had been examined by consent, and that, subsequently

Tenthly,
Examination
of witnesses,
and evidence
of the parties.

(v) "You shall true answer make to all such questions as shall be asked of you by or before me touching or relating to the matters in difference referred to my award [or to the award of myself and G. H.] without favour or affection

to either party, and therein you shall speak the truth, the whole truth, and nothing but the truth."

So help you God.

(w) *Warne v. Bryant*, 3 Bar. & C. 590. See form, ante, 90.

Form of oath or affirmation to be administered by an arbitrator to a witness, pursuant to 3 & 4 W. 4, c. 42. s. 41.

CHAP. III.
OF REFERENCES
TO ARBITRA-
TION, &c.

to the award, the plaintiff had discovered that the defendant was a felon convict. It appeared, however, in that case, that the judgment of the arbitrator was formed independently of the defendant's testimony. (x)

Eleventhly,
Mode of taking
the evidence.

As, under the recent act, witnesses will certainly be indictable if guilty of perjury, the evidence, whether in examination or cross-examination, when any case of perjury is apprehended, should be carefully taken down in writing in the form of questions and answers; and, when concluded, the witness should read over the same, and be asked by the arbitrator whether he would wish to add any thing; and the further questions and answers should be also written down; and then the witness may as well sign the statement. And the attorney for each party should take and keep a duplicate, or the original should be retained by the arbitrator.

Twelfthly, Of
Revocations in
fact or law.

The recent act, 3 & 4 W. 4. c. 42. s. 39, we have seen, prevents the effect of any Revocation by *act of the parties*, in all cases where the agreement of reference was in writing, and stipulated that the submission should be made a rule of a Court of Record; for it *requires* the arbitrator to proceed *ex parte* in case of any such revocation, and declares that the award shall be valid notwithstanding it. (y) In cases not within the act, although an award after notice of revocation would be invalid, yet if there has been a mutual agreement, bond, or covenant to submit to arbitration, and abide by an award to be thereupon made, it is clear that upon proof that there was a debt or damages to a certain or ascertainable amount justly recoverable, and which probably would have been awarded, the same sum would probably be recovered from the party revoking and his surety, in an action upon the contract of submission, assigning the revocation as a breach thereof; and probably upon stating the payment of costs and expenses occasioned by the revocation as special damages, those also would be recovered. (z)

It will be observed, however, that the recent statute does not absolutely prohibit a revocation, but only requires the leave or sanction of the Court or Judge to such a proceeding. And as

(x) *Smith v. Sainsbury*, 9 Bing. 31.

(y) *Ante*, 82. Before that act, in *Skee v. Coxon*, 10 B. & Cres. 483, it was held, that a revocation of a submission, even by order of *nisi prius*, rendered a subsequent award invalid, and that the only course was to proceed to punish the

party for his contempt; and see *Clapham v. Higham*, 1 Bing. 87; 7 Moore, 403, S. C.

(z) *Ante*, 80; *Warburton v. Storr*, 4 B. & Cres. 103; and per Parke, J. in *Skee v. Coxon*, 10 B. & Cres. 483.

before, so still since the act, there may be cases where perhaps even without previous leave a revocation might be given effect to, although in all respects the submission were perfect under the act; as if the arbitrator should act partially, or otherwise improperly. (a) Strictly, in such a case the proper course would be, upon affidavit of the facts, to move or obtain a summons for leave to revoke, with in the mean time a stay of the proceedings upon the reference; but perhaps the sudden expectation of a precipitate and unjust award would justify an immediate revocation to prevent it, and which proceeding would probably afterwards be sanctioned by the Court. (b)

It is probable that the *Marriage* of a woman pending a reference, although a legal revocation, would be considered a revocation by her own act within the meaning of the statute, and that an arbitrator might in such a case proceed. (c)

By marriage.

The Death or Bankruptcy of a party is not provided for by this or any other act, and consequently the previous decisions in those cases will still apply. The *Death* of either of the parties is in law an *implied revocation* of the power to proceed, unless it be expressly or *impliedly provided otherwise*. (d) If by the terms of reference the award is to be delivered to the parties, or *their executors or their personal representatives*, that is considered evidence of an intended authority to proceed, notwithstanding death. (e) If, therefore, the evidence of either of the parties would be important, it should be provided that unless his evidence has been previously given, the authority to award shall be determined by his death; and it would be advisable to take his evidence in the first instance, so as to avoid any supposition that any evidence has been excluded.

By death.

The law upon the subject of revocation by death has been recently fully examined in the Privy Council; and it was held, that an award is invalid if one of the parties to the reference should die before it were made, unless the *heir* or representative of the party has been expressly named in the submission. (f)

(a) *Green v. Pole*, 6 Bing. 443; *Steward v. Williamson*, 5 Bing. 415; 2 B. & Ald. 395; 1 Chit. R. 204, S. C.; and see Tidd, 9th ed. 835.

(b) *Id.* *ibid.*

(c) 5 East, 266; Tidd, 9th ed. 822, 3, 835.

(d) *Rhodes v. Haigh and another*, 2 R. & Cres. 345; *Tyler v. Jones*, 3 B. & Cres. 144; *Clark v. Crofts*, 4 Bing. 143; *President v. Van Reenen*, Knapp's Rep. 33, 100, 102; *post* 103, note (f). See express proviso, *ante* 89, in note.

(e) *Jones v. Tyler*, 3 B. & Cres. 144; *Clark v. Crofts*, 4 Bing. 143; *M'Dougal v. Robertson*, *id.* 435; 6 B. & Cres. 255; 7 Taunt. 571; 1 Marsh. 566; 2 B. & Ald. 394.

(f) *The President and Members of Orphan Board v. Reenen*, Knapp's Rep. 83—100, 101, A. D. 1829. In giving judgment, the Court said: If men who submit to arbitration, in the instrument of submission bind *their representatives*, in a case where the action would survive to or against their representatives, al-

CHAP. III.
OF REFERENCES
TO ARBITRA-
TION, &c.

Bankruptcy,
its effects.

But where a submission to arbitration contained an express stipulation that it should not be vacated by the death of either of the parties, and that notwithstanding such an event matters should be proceeded in, and the final award was made after the death of one of the parties, it was held that even *a surety* for the fulfilment of it was liable. (g) Probably if an executor should *adopt* an arbitration, although the personal representatives were not named in the submission, he would be bound, (h) and might even be personally liable to costs. (i) The death also of the arbitrator will determine all power to proceed, unless the submission should provide otherwise. (k)

The *Bankruptcy* of either party is not necessarily a revocation of the arbitrator's authority to proceed and make his award, at least so as to bind the bankrupt and his opponent. (l) But in case the assignees should, before the award has been made, give notice of their dissent to any further proceeding in the refer-

though one or both of the parties should die before the award be made, the arbitrators may proceed with the reference. They have provided for the event of death, and agreed that those who take their property, should take it subject to the decision of the arbitrators appointed; but if the representatives are *not included* in the reference, and one of the parties die, that reference is determined. It has been argued that the ancestor and heir are identified, and that what binds one binds the other. If the ancestor bind the property, the heir must in general take it, subject to the obligation which the ancestor has imposed on it. But this rule does not apply to arbitrations. *A man who agrees to a reference may know that he is capable of giving explanations which his heir cannot give.* He knows that if his opponent be examined as a witness, he may be examined also. For these reasons he may agree to bind *himself* to submit to an arbitration; but not to bind those who are to succeed him. That this principle is founded in wisdom, is proved from its having been adopted into the laws of England, Scotland, (Erskine's Institutes, book 4, tit. 3, s. 33,) Spain, (Johnson's Translation of the Principles of the Spanish Law, p. 295), and into the civil law (Dig. lib. 4, tit. 8. l. 27; Domat. lib. 1, tit. 14, s. 1, pl. 6). We have been referred to no Dutch authority to show us that the law of Holland differs from the civil law, or that of other states which have adopted the civil law. The passage cited from Vanderlinden applies to actions in Court, not to arbitrations. It seems that according to the law of France, (Code de Procedure

Civile, liv. 3, tit. Unique, s. 1013), an arbitration is not stopped by the death of one of the parties, if his heir be of full age; (see also as to the French law on Arbitrations, the Code de Commerce, liv. 1, tit. 3, s. 2. Des Contestations entre associés;) but I think a French jurist must have thought the reference could not have been continued in this case, where the heir was a married woman, the right of the husband to represent her was disputed, and the dispute in this point was kept up for nearly three years, during which time the arbitrators proceeded, attended only by one party. According to the civil law, if the heir of one party be named, and the heir of the other be not named, and either party dies, the reference is at an end. We therefore think, that the judgment of the Court of Appeal, which is founded on the evidence of a void award, and the judgment of the Court of Justice, which, after the submission of the parties to arbitration, treated the settlement between them as conclusive, must be set aside, and the cause sent back for the further examination of all the accounts.

(g) *M'Dougal v. Robertson*, 4 Bing. 435; id. 143; 3 Bing. 20; 3 B. & Cres. 144.

(h) *Seemle*, with analogy to the cases of the assignees of a bankrupt; *Dod v. Herring*, 1 Russ. & M. 153; 3 Simon's Rep. 143, S. C.

(i) *Joseph and Webster*, 1 Russ. & M. 496.

(k) 4 J. B. Moore, 3. See stipulation *ante*, 90.

(l) *Snook v. Hellyer*, 2 Chitty's Rep. 48; 4 B. & Ald. 250.

ence, or if they should forbear to attend the arbitrator, it would seem that a subsequent award would not be conclusive against the estate; (*m*) though if the assignees should adopt the arbitration, they will then be bound by the award. (*n*) When assignees of a bankrupt have agreed to refer, as we have seen they may do, after convening a meeting of creditors, and sometimes with the consent of the commissioners; (*o*) and the 1 & 2 W. 4. c. 56. s. 43, provides that the agreement of reference may be made a rule of the Court of Bankruptcy. Where a cause and all matters in difference were referred at *nisi prius* to an arbitrator, and he found that a sum of money was due from the plaintiff to the defendant, and ordered that sum to be paid to the latter: and between the time of making the order of reference and taxing costs and signing judgment the plaintiff became a bankrupt; it was held, that the amount of the taxed costs did not constitute a debt provable under the commission, and that the bankrupt was not discharged, as to that debt, by his certificate. (*p*) Hence it would be advisable for parties subject to the bankrupt laws expressly to provide in the submission that the bankruptcy of either should operate as a revocation, unless the award shall be made before any act of bankruptcy has been committed. (*q*)

The award must strictly pursue the power, or it will be void, even in respect of a slight informality; as where the submission required an award under *hand*, and the award was not signed, though under seal. (*r*) So if the award was required to be under seal, and it be only signed; (*s*) and even where the award was to be made by four arbitrators, or any three of them, and the award purported to be made by the four, but was only signed by three, it was holden void. (*t*) But where an award, after reciting that *A. B.* and *C. D.* had been appointed arbitrators, and that they had appointed *E. F.* umpire, proceeded "We the said arbitrators do award, &c.," and was signed by the two arbitrators and the umpire, it was held that the latter, by signing the award, had adopted the language as his, and that the arbitrators joining in the award would not prejudice. (*u*) And an award by two out of three, under a power for two to make their award in case the three should not concur,

Thirteenthly, of the Award.

Must conform to the authority in submission.

(*m*) *Dod v. Herring*, 3 Simons, 143; 1 Russ. & M. 153, S. C.; *Blundell v. Brettargh*, 17 Ves. 241.

(*n*) *Dod v. Herring*, 1 Russ. & M. 153; 3 Simon's Rep. 143 S. C.; *Marsh v. Wood*, 9 B. & Cres. 659; *Andrews v. Palmer*, 4 B. & Ald. 25.

(*o*) *Ante*, 77, 78.

(*p*) *Haswell v. Thorogood*, 7 B. & Cres. 705.

(*q*) See form *ante*, 89, 90.

(*r*) 2 Marsh. 304; 3 M. & S. 512.

(*s*) M. S. K. B. A. D. 1818.

(*t*) *Thomas v. Harrop*, 1 Sim. & Stu. 524. See form *ante*, 89.

(*u*) *Bates v. Cooke*, 9 Bar. & C. 407.

CHAP. III.
OF REFERENCES
TO ARBITRA-
TION, &c.

suffices, if it recite the disagreement of the three, without shewing the dissent of the third under his hand. (u)

So if the power of an arbitrator has been limited to a *particular matter*, he cannot award beyond it; and therefore it was held that a reference to arbitrators *to balance accounts and settle all matters in dispute respecting the leaving and occupying of two corn-mills and a dwelling-house*, did not authorize them to decide on the *costs of an action* for fixtures, at least up to the time of paying money into Court, when the submission was entered into; (v) and a submission to refer a cause, and the subject-matter thereof, and the issue therein, to the award of a barrister, does not authorize him to order a verdict to be entered up; but that decision probably proceeded on the impracticability or impropriety of the arbitrators directing a feigned trial and *postea* in favour of the plaintiff, when the cause had not been tried, for a reference of a cause would authorize an award that the defendant should suffer a judgment. (w)

Must, in terms or substance, decide upon and provide for all sustainable claims referred.

On the other hand, an arbitrator must, when all matters in difference are referred to him, take care by his award, either in terms or *in effect*, to decide upon all matters of claim that were brought before him, and which are to any extent tenable; and must not, because a claim has been admitted before him, or because the parties have not pressed or even requested him to arbitrate upon the subject, omit to notice or include it in his award; for though the parties might not dispute the claim before the arbitrator, yet a general award, professedly upon all matters in difference, would afterwards preclude the party from suing for or otherwise recovering the admitted claim so unprovided for; and this constitutes an exception to the rule, that a general award, seemingly sufficient on the face of it, or at least not disclosing the defect, cannot be questioned upon the merits. (x) Therefore where on a reference of all matters in difference a demand on one side was laid before the arbitrators, *and immediately admitted* by the other party, and therefore no evidence was given concerning it, nor any adjudication upon it requested, and the arbitrators published their award of and concerning all matters in difference referred to them, directing payment of a sum of money, without saying on what account, to the party against whom the above claim

(u) *M'Callam v. Robertson*, 2 Wils. & S. 344.

(v) *Stratton v. Green*, 8 Bing. 437; 1 Moore & S. 668, S. C.

(w) *Hutchinson v. Blackwell*, 8 Bing. 331; 1 Moore & S. 513, S. C.

(x) *In matter Robson and Railston*, 1 B. & Adolp. 723; and Tidd, 9th ed. 829.

had been made, with costs; and it was established *by affidavit*, that they had left that claim out of consideration in making their award, because, as it was admitted, they erroneously thought it was not to be deemed a matter *in dispute*; it was held that the award was on that account bad, as the arbitrators ought, in their award, to have taken notice of and provided for the payment of such admitted demand. (y) If by the terms of the submission it is *compulsory* on the arbitrator to award *separately* upon each claim, *and to state therein* whether he determine for or against the same, his award must be framed accordingly; but when the reference is general, provided the arbitrator duly considers, and by his award provides for the payment of all sustainable claims, he need not therein notice or allude to any claim which he thinks is untenable, though it may be safer, and prevent subsequent discussion, if each claim be shortly noticed, and as concisely disposed of.

Although in general an award absolutely that a party shall do a thing *impossible*, is altogether void, yet if it also give the party an alternative which he could perform, it would be otherwise. (z)

The award must be *certain, clear, decisive, and final*. And an award that all actions shall be discontinued, (a) or, that nothing is due to the plaintiff, (b) or, that a named sum of money shall be paid to the plaintiff in the action, and that a recited bill in Chancery shall be dismissed, and that all proceedings therein shall utterly cease and determine, (c) or, that the plaintiff had no cause of action, (d) is sufficiently certain and final. (e) In cases where only a particular cause, or even where all matters in difference have been referred, the usual form is merely to award "that the said defendant shall, on the — day of —, at the "office of the attorney for the plaintiff, (naming the hour and "place) pay, and the said plaintiff accept and receive the sum "of —l. in full satisfaction and discharge of all the said matters "so referred to me as aforesaid," and that (according to the arbitrator's decision), "the said defendant shall at the same time "and place pay the costs of the said reference and of this my "award." And these terms are final, without more, and in that case there is not any occasion for any award of releases, which would occasion unnecessary expense. In cases, however,

Award to do
an impossible
or illegal act,
when valid.

But an award
must be final,
and when
deemed so.

(y) *In matter Robson and Railton*, 1 B. & Adolph. 723; and Tidd, 9th ed. 829.

(z) *Wharton v. King*, 2 B. & Adol. 528.

(a) 9 East, 497.

(b) *Dickins v. Jarvis*, 5 B. & Cres. 528; *Jackson v. Yatsley*, 5 B. & Ald. 848.

(c) *Pearse v. Pearse*, 9 B. & Cres. 484; *Cargrey v. Aitchison*, 2 Bar. & Cres.

170; 2 Bing. 199; 9 Moore, 381, S. C.

(d) *Hayler v. Ellis*, 6 Bing, 225; 5 B. & Ald. 861; Tidd, 9th ed. 829.

(e) As to the requisite certainty, &c. see cases, Tidd, 9th ed. 828.

CHAP. VII.
OF REFERENCES
TO ARBITRA-
TION, &c.

of considerable importance, and in order more strongly to denote that the arbitrator intends finally to determine all differences, it may be prudent to award "that each of the said parties shall, after such payments and full performance of my award, at the request, and at the costs and charges of the other party, execute to him a general release of all matters in difference up to the time of the said agreement of reference;" (f) for in a late intricate case it was considered that one mode of rendering an award final, was to direct that the parties should either absolutely, or upon a named payment, or other event, execute mutual releases if required, at the expense of the party requiring, or otherwise. (g)

Where a cause was referred to an arbitrator, with *liberty* to him to state upon his award any point of law raised by either party in reference to the matters thereby referred; and certain points of law were accordingly submitted to the arbitrator, which he set out upon his award, (but without reference to any particular state of facts), and certified that he had over-ruled them; the arbitrator's decision upon these points, as abstract propositions, being correct, the Court refused either to refer it back to him to amend his award by setting forth the facts upon which the questions of law arose, or to set aside the award. (h)

When not certain, or final, or defective, because it does not order payment.

But an attachment was refused upon an award which found a debt to be due, but did not contain any order to pay. (i) And where upon reference to a surveyor, of a cause and all matters in difference, he awarded "that the defendant had overpaid the plaintiff 34*l.*;" this was held insufficient to entitle the plaintiff to enforce the award by attachment. (k) The best course, when the submission so authorizes, is for the award not only to order payment on a named day, or on request, but also to direct what judgment shall be signed as a security.

A legal arbitrator may decide contrary to strict rules of evidence or law.

When a *cause* or *causes*, or a question of *law* or of *fact separately*, have been referred to a barrister, it is considered that the parties agreed to constitute him their absolute judge of law as well as fact; and if he *intentionally* decide either contrary to the strict rules of evidence, as by receiving the testimony of a person who was not a competent witness, (l) or against law, as denying effect to a defence upon usury or other illegality,

(f) *Wharton v. King*, 2 B. & Adolp. 528; and *id.* 535, cites *Birks v. Trippet*, 1 Saund.

(g) *Id.* *ibid.*

(h) *Jay v. Byles*, 3 Moore & Scott, 86. *Ante*, 87, 88.

(i) *Edgell v. Dallimore*, 3 Bing. 634.

(k) *Thornton v. Hornby*, 8 Bing. 13; 1 Moore & S. 48, S. C.

(l) *Perriman v. Steggall*, 9 Bing. 679; *Smith v. Sainsbury*, 9 Bing. 31; 1 Chitty's Rep. 674; 3 B. & Ald. 237; but see 1 M'Clel. & Y. 100; Tidd, 9th ed. 844.

although clearly proved before him, (*m*) this intentional decision will not be set aside, unless the legal objection be stated on the face of the award, (*n*) or appear to the Court in some other authentic way, as in writing. (*o*) But if it should appear that the arbitrator intended to decide according to law, but mistook it, and thereby made an erroneous award, the Court will in some cases interfere if there has been any real injustice.

In general, however, an arbitrator should receive and act upon legal evidence, and decide according to law or equity; because the long established rules will be found in general better to be observed than the immature and perhaps imperfect views of any single individual. But when the very object of the reference was, as frequently occurs at *nisi prius*, to avoid a legal or technical objection, and to attain a decision according to equity and good conscience, a legal arbitrator would quite mistake his province if, influenced by strict and general rules of law, he should defeat the object by adhering to formal or legal objections.

The extent and exercise of the jurisdiction of the arbitrators over the *costs*, whether of the *cause* or of some particular proceedings in or collateral to, or connected with the cause or the costs of the reference and of the award, very frequently are the subjects of inquiry and motion to the Court, or other proceeding. Mr. Tidd's Practice is clear upon the law; and only a few other cases will here be noticed. We have seen that on general principles, the party right in the result, should be wholly indemnified from all expenses; but yet, not unfrequently, arbitrators will make each party pay half the costs of the reference, or his own costs, and pay his own fees in moieties; and where the successful party has been in a degree to blame, or has had the benefit of investigation of intricate accounts, such division of expenses may be just. The parties themselves should, before they sign the agreement to refer, take care that proper provisions are introduced, not only as regards the costs of the cause, but also of collateral proceedings; and the arbitrator, before he make his award, should make distinct inquiry how all questions of costs stand, and take care to fully exercise his powers over them, for otherwise some of the costs may be lost.

As to awarding costs.

The costs of a reference and award, under an order of *Nisi*

(*m*) *Cramp v. Symonds*, 1 Bing. 104; 666.
 7 J. B. Moore, 434, S. C.; 13 East, (n) *Id. ibid.*
 357; 1 M. & Sel. 105; 5 M. & Sel. 504; (o) 2 Young & J. 115.
 1 D. & Ry. 366; 6 Taunt. 254; 9 Moore,

CHAP. III.
OF REFERENCES
TO ARBITRA-
TION, &c.

Prius, are not costs in the cause, and consequently would not be recoverable unless expressly provided for by the arbitrator. (*p*) But where, in an action of trover, a verdict was taken for the plaintiff to the full amount of the goods converted, the plaintiff consenting to take them back in reduction of damages, upon its being referred to an arbitrator by order of *Nisi Prius*, to ascertain the amount of deterioration, and which amount with the costs in the cause were, by the order, directed to be paid to the plaintiff, it was held, that the expense of witnesses attending the arbitrator were costs in the cause. (*q*) And where an arbitrator to whom it was referred to certify what verdict should be entered up, certified for the plaintiff, and orally communicated to the parties, that each should pay his own costs of the reference, which was acceded to by them; and the cause having afterwards been referred back to the arbitrator, he certified in the same way a second time, but omitted to give any direction as to the costs of the second reference: it was, nevertheless, held that the plaintiff was entitled to those costs. (*r*) Where a verdict had been found for the *defendant*, and a rule for a new trial was obtained, and thereupon the cause was referred to a barrister, and the costs of the cause were to be in his discretion; and he found that the plaintiff was entitled to recover, and ordered the defendant to pay the costs of the cause; yet it was held that the plaintiff was not entitled to the costs of the first trial. (*s*) And it has been laid down, that when a rule for a new trial is silent as to costs of the first trial, and the cause is afterwards referred at *Nisi Prius*, and determined in favour of the plaintiff, he is not entitled to the costs of the first trial. (*t*) And where a defendant was arrested, and holden to bail for 28*l.*, and paid 2*l.* into Court, and afterwards the cause before it came on for trial, and all matters in difference, were referred to an arbitrator, who had power to examine the parties, and call for books, &c., and it was agreed that the costs should abide the event, the arbitrator having awarded to the plaintiff the sum of 1*l.* 19*s.*; a motion was made to allow the defendant his costs: it was held that this was not a case within the 43 Geo. 3, c. 46, s. 3, and that the defendant was not entitled to costs. (*u*) So the Court also refused the defendant his costs, where the arbitrator had awarded that the plaintiff should pay a named sum to the

(*p*) *Taylor v. Gordon*, 9 Bing. 570.
(*q*) *Tregoning v. Attenborough*, 7 Bing. 733; 6 M. & P. 453, S. C.
(*r*) *Mackintosh v. Blyth*, 1 Bing. 269; 8 Moore, 211, S. C.

(*s*) *Rigby v. Okell*, 7 Bar. & C. 57.
(*t*) *Summers v. Formby*, 1 Bar. & Cres. 100.
(*u*) *Keene v. Deeble*, 3 Bar. & C. 491.

defendant for the vexatious arrest. (v) And where a cause and all matters in difference were referred to an arbitrator, and nothing was said about costs, it was held that although the arbitrator had power over the costs of the cause, yet that he had not over those of the reference; (w) and when by a rule for setting aside an inquisition before the sheriff for excessive damages, the matter was referred, and nothing was said about the costs of the application, and the arbitrator by his award reduced the damages, it was held that the plaintiff was not entitled to the costs of the application. (x)

CHAP. III.
OF REFERENCES
TO ARBITRA-
TION, &c.

There is not in general any prescribed form of award; we have seen how it should be *substantially* framed, and numerous precedents will be found published to assist in various cases, but the award must necessarily vary according to the circumstances of each particular case. (y) Subscribed is a concise form which will in general apply; and the forms of awards finding the facts and points of law specially for the opinion of the Court, and which may be readily applied to any case that may arise, will also be found in the note. (z)

The form of
awards.

(v) *Thompson v. Atkinson*, 6 B. & Cres. 193.

(w) *Firth v. Robinson*, 1 Bar. & Cres. 277.

(x) *Lewis v. Harris*, 2 Bar. & C. 620.

(y) See several precedents in Tidd's Forms; Watson on Arbitrations, Appendix; and the very full collection in Chitty's Commercial Law, 4 vol. 372 to 400.

(s) To all to whom these presents shall come, I, X. Y., of _____, Esquire, barrister at law, send greeting: Whereas at the sitting at *Nisi Prius* after term last, holden at the Guildhall of the city of London, on _____ before the Right Honourable _____ Lord Chief Justice of his Majesty's Court of _____ at Westminster, a certain order was made in a certain cause then depending in the same Court, wherein *A. B.* was and is plaintiff, and *C. D.* was and is defendant, whereby, amongst other things, it was ordered by the said Court, by and with the consent of the said parties, their counsel and attornies, that a verdict should be entered for the said plaintiff, damages 500*l* and costs 40*s.*; but that such verdict should be subject to the award, order, arbitrament, final end and determination of me, the said X. Y., who was thereby empowered to direct that a verdict should be entered for the plaintiff or the defendant, as I should think proper, and to whom *the said cause* [depending on the fact, "*and all matters in difference between the said parties respectively*"] were thereby referred, so as I, the said arbitrator, should make and duly publish my award in writing of and concerning the matters referred, ready to be delivered to the said parties, or to either of them, or if they or either of them should be dead before the making of my said award, to their respective personal representatives who should require the same, on or before the _____ day of _____ then next ensuing, or on or before any other day to which I the said arbitrator should by any writing under my hand from time to time enlarge the time for making my said award. And whereas the time limited for making my said award hath been duly enlarged until the _____ day of _____ next. Now know ye, that I the said X. Y. having taken upon myself the burthen of the said reference, and having heard, examined, and considered the several allegations and proofs of the said parties respectively, do thereupon make this my award in writing concerning the same in manner following, that is to say; I do award and adjudge and determine of and concerning the said matters so referred to me as aforesaid, that before and at the time of the commencement of the said action, and at the time of the making of the said reference, there was and still

Common forms
of an award, in
favor of a
plaintiff, upon
a reference of
a cause and all
matters in
difference.

Recital of order
of *Nisi Prius*.

Time enlarged.

Hearing of
parties and
evidence.

Award.

CHAP. III.
OF REFERENCES
TO ARBITRA-
TION, &c.

In causes of small importance, or when the mere quantum of damages is referred to a barrister, and there is little proba-

Fourteenthly,
Of a certificate
in lieu of an
award.

is justly due from the said defendant to the said plaintiff the sum of —£—, and I do award and direct that a verdict shall be entered in the said action for the said plaintiff for that sum, and that the said defendant do and shall pay the said sum of —£— to the said plaintiff, and the said plaintiff shall accept and receive such payment from the said defendant in full satisfaction and discharge of *all matters in difference between the said parties* to the time of making of the said order of *Nisi Prius*. And I do further award, order, and direct that the said defendant do and shall pay all the costs of the said reference and of this my award; and that if the said plaintiff shall pay the same, or any part thereof, then the said defendant shall forthwith repay and reimburse the same. And I do further direct and award, that after payment by the said defendant of the said sum of money, and of the costs of the said reference and of this my award, as aforesaid, each party shall, if required so to do, at the request, costs and charges of the other of them, but not otherwise, execute to him a good and sufficient release of and concerning all and every of the said matters so referred to me as aforesaid. In witness whereof I have hereunto subscribed my hand, this — day of —, in the year of our Lord 1833.

X. Y.

Signed and published by the said arbitrator,
as his award, on this day — of —,
A. D. 1833, in the presence of me,

G H.

An award
under an order
of *Nisi Prius*
for plaintiff,
but subject to
facts for the
opinion of the
Court, with a
report of the
decision of the
Court thereon
alluded to *ante*,
1 Vol. 300, 1.

[Recite the order of *Nisi Prius* and the enlargement of time, as in the last form, and then proceed:] Now I the said arbitrator, having heard and examined the proofs and allegations of the parties, do make and publish this my award in writing as follows; (that is to say,) I award that the verdict entered for the said plaintiffs do stand, but that the damages be reduced to 104*l.* 1*8s.* 8*d.*; and I find that the plaintiffs have paid the above sum to their attorney, Mr. — and his surveyor, being their fair and reasonable charges and expenses in ascertaining the value of certain real property of the defendants, situate at — which property the defendants had, before the incurring of the said expense, offered to mortgage to the plaintiff; and I find as a fact that the defendants, before the above expense was incurred, agreed in writing with the attornies of the plaintiffs in the terms following:—

“ We beg to say that we consider our negotiation with Mr. — of your firm “ for the mortgage of property at — as closed, subject to the approval “ of Mr. — and his surveyor of the security, and we engage to pay their fair “ and reasonable expenses in ascertaining the value of the property.” I consider that in this agreement the understanding of both plaintiffs and defendants was that the said expenses were to be borne by the defendants *at all events*, although the proposed mortgage was ultimately not completed, and although such non-completion should arise from the fault of the plaintiffs; and I certify that the mortgage was ultimately not completed, and that I consider that such non-completion did arise from the fault of the plaintiffs, and that my award is founded on the above-mentioned facts; and as to the non-completion of the said mortgage, I find that after the said last-mentioned expense had been incurred, *I. K.* and *L. M.*, as attornies for the plaintiffs, and *O. P.*, as attorney for the defendants, agreed in writing in the following terms: “ *I. K.* and *L. M.*, on the behalf of their clients, have agreed, and “ *O. P.* on the behalf of his client, to advance them by way of mortgage of the “ property the sum of 20,000*l.* sterling at 4*l.* per cent. interest, subject to “ the approval of the title, and the execution of such mortgage securities as shall be “ recommended and approved of by their conveyancer.” The conveyancer of the plaintiffs recommended that a receiver of the rents and profits of the estate should be appointed, who should pay the interest to the plaintiffs and effect such insurances as should be stipulated for by the terms of the mortgage deed, and pay the residue over to the defendants, such receiver to take the rents and profits whether or not default should have been made in the payment of the interest or in the effecting of the insurances. And I find as a fact that this recommendation of the conveyancer was not made on account of any defect in or difficulty arising from the title of the defendants, but only on account of the nature of the property itself. The defendants refusing to consent to the appointment of such a receiver, the plaintiffs refused to advance the money, and for this reason the mortgage was not completed. I consider that the plaintiffs were not entitled by the agreement to insist upon the appointment of such a receiver, and that therefore the non-completion of the mortgage arose from the fault of the plaintiffs. And I further find that the plaintiffs were

bility of the necessity for any motion to set aside the award; it is usual, in order to save the expense of a formal award on

CHAP. III.
OF REFERENCES
TO ARBITRA-
TION, &c.

put to the further expense of 26*l.* 5*s.* by the negotiations respecting the mortgage, which sum I do not consider that the plaintiffs are entitled to recover, and therefore do not allow the same. But if the plaintiffs be entitled to recover both the above-mentioned sums, then I direct that the verdict be entered up for 131*l.* 3*s.* 8*d.*; and if the plaintiff be not entitled to recover the said sum of 104*l.* 18*s.* 8*d.*, but be entitled to recover the said sum of 26*l.* 5*s.*, then I direct that the verdict be entered up for 26*l.* 5*s.* And I further award that the costs of the reference and of this my award be borne by the defendants; but if the plaintiffs be not entitled to recover either of the above sums, then I direct that the verdict found for the plaintiffs be vacated, and the verdict be entered for the defendants; and that the costs of the reference and of this my award be borne by the plaintiffs. In witness whereof I have hereunto set my hand, this 30th day of July, A. D. 1829.

(Signature of arbitrator)—X. Y.

Signed and published (being first duly stamped) in the presence of

W. C.

St. Leger and another v. Robson and another. Upon the trial, the cause was referred to a barrister, who awarded in the above form; and upon motion to the Court to set aside the award, the Court directed the award to be stated in a *case* for the opinion of the Court; and after argument of Mr. Wyburn for the plaintiff and Mr. Platt for the defendant, the Court gave judgment for the defendant as follows on 30th April, A. D. 1831.

Lord Tenterden, C. J., said, the *first question* is, whether the agreement was to pay the expense of ascertaining the value of the property *at all events*; and although the negotiation went off by the fault of the plaintiffs, I am of opinion that the arbitrator was mistaken on that part of his award. The second question is, whether by the terms of the *second* agreement, the plaintiffs were entitled to insist on the appointment of a receiver. The arbitrator thought they were not, and in that opinion I concur. The words "*securities*," in the second agreement, referred to the land and the deeds. A receiver is not usual, and it cannot be supposed to have been intended by the parties to the agreement that a receiver should *at all events* be appointed. I think the verdict should be entered for the defendants.

Littledale, J.—If the plaintiffs were justified in insisting upon an immediate receiver, then they would have been entitled to the expenses; but a receiver might be very objectionable.

Parke, J.—I am of opinion that the plaintiffs are not entitled to recover. In construing the first agreement the arbitrator is wrong. It is clear a good title has been made out, and that the plaintiffs had agreed to advance the money. Then as to the receiver, the arbitrator was perfectly right; but I think the award is wrong in allowing any expenses to the plaintiffs, and that the verdict should be entered for the defendants.

Patteson, J.—It seems to me quite clear that the plaintiffs are not entitled to recover on the first agreement. It cannot be supposed that a receiver was contemplated by the second agreement. I am of opinion that the verdict should be entered for the defendants.

Now therefore know ye that I the said , do award, order, and adjudge, Award, finding that if the Court in which the said action is brought, shall be of opinion, and facts and adjudge upon the facts and matters found, and stated by me upon this my award judging upon as aforesaid, that the said plaintiff , is a proper and sufficient party to them, in form bring and maintain the said action against the said defendant; and that there is analogous to a and appears a sufficient consideration for the said promissory note, to enable the special verdict. said plaintiff to maintain the said action against the said defendant, and that the said action is not barred by the statute of limitations, as pleaded by the said defendant to the said action, then the verdict already entered up for the plaintiff shall stand, but the damages shall be reduced to the sum of two hundred and seventy-nine pounds fourteen shillings, with interest upon the sum of two hundred and fifty pounds, after the rate of five pounds per centum per annum, from the fourth day of Easter term now present, to the day when final judgment shall be signed in the said action; but if the said Court shall be of opinion and shall adjudge, that upon any of the grounds aforesaid, the said action cannot be maintained by the said plaintiff against the said defendant, then and in that case the said verdict for the plaintiff shall not stand, but a nonsuit shall be finally entered. And I hereby direct, order, and adjudge, that both or either of the said parties shall and may be at liberty forthwith to apply to the said Court, to obtain the opinion and

CHAP. III.
OF REFERENCES
TO ARBITRA-
TION, &c.

stamps, to take the verdict generally for the damages in the declaration, with an authority to a named counsel *to certify* the amount; and in that case, after hearing the witnesses precisely as in an ordinary reference, he will return his certificate to the Judge's marshal, in order that he may enter the verdict accordingly. In that case the certificate may be in the subscribed form. (c)

When an
award may be
good in part,
and void as to
the residue.

It is settled at law (d) as well as in equity, (e) that an award may be good in part, and bad in part, when the subjects are clearly capable of being separated; but not where all the matters are within the submission, and the award is upon the face of it entire; (e) and supposing, in a reference of a cause and of all mat-

Award of re-
lease.

judgment of the said Court upon the matters aforesaid, in such form and manner as the said Court shall please to direct or permit. And I do further award, determine, and adjudge, that the said _____ is not indebted unto the said _____ party to this reference, for or on account of any matter or thing in relation to the said farm called _____, and the premises demised by the said indenture of lease as aforesaid, or for or on account of the proceeds thereof; and I order, award, and direct, that the costs of this reference up to, and including the hearing before me on the thirtieth day of August last past, at York, shall abide the event of the cause, but that the subsequent costs of the said reference shall be paid by the said plaintiff, on or before the first day of June next ensuing, and shall be allowed to him the said plaintiff, by the said _____, out of the proceeds of the said farm, lands and premises, demised by the said indenture of the day of _____, A. D. _____, upon trust as aforesaid, and that the sum of twenty-five pounds, being the costs of making this my award, shall be paid in equal moities, one moiety thereof by the said plaintiff, and the other moiety thereof by the said defendant; and that upon payment by the said plaintiff of such of the costs of reference as are directed to be paid by him as aforesaid, the said _____ shall, if required by the said plaintiff so to do, execute and deliver to him the said plaintiff, a general release in writing, under the hand and seal of him the said _____ of all and all manner of action and actions, suit and suits, cause and causes of action and actions, suit and suits, duties, accounts, reckonings, claims and demands whatsoever, from the beginning of the world until the day of the date of the aforesaid order of reference. In witness whereof, I the said R. M., the arbitrator aforesaid, have hereunto set my hand this _____ day of _____ A. D. _____.

(Signature of the arbitrator)—R. M.

Form of a cer-
tificate instead
of an award.

(c) "To the Marshal of the *Exchequer*,"
"In the *Exchequer of Pleas*."

{ A. B. - - Plaintiff.
&
C. D. - - Defendant.

I hereby certify, that in my opinion, a verdict should be entered for the plaintiff in the above cause, for damages Fifty-five pounds nineteen shillings; and if I am empowered so to do, I certify that it is my opinion, that the said defendant ought to pay, and shall pay, all the costs of this action from the commencement thereof to the present time, and all costs incident or collateral to the same, together with the costs of the reference to me, and of this my certificate. (*)

G. H.
Arbitrator.

Nov. 20, 1832.

(d) See cases, Tidd, 9th ed. 829, 830; and the law of Scotland is the same; see 2 Dow's New Ser. 121.

(e) *Auriol v. Smith*, 1 Turn. & Russ. 128

(*) *Mackintosh v. Blyth*, 1 Bing. 26; 7 Bar. and Cres. 57.
8 Moore, 211, S. C.; *Rigley v. Okell*,

ters in difference, the arbitrator should correctly award in favour of the plaintiff as to the amount of his claims, but neglect to allow the defendant's available set-off, then although the claims are cross and distinct, yet the whole award would be bad, because the defendant had a right to the benefit of his set-off, in reduction of the plaintiff's claim. (*f*)

An award is to be considered as *published* and ready to be delivered, when the parties have notice that it is ready for delivery on payment of the arbitrator's reasonable charges. (*g*) But if an arbitrator should refuse to deliver his award until after the time for making it had expired, unless an unreasonable fee were paid, he would perhaps incur the risk of his award being altogether invalid, for want of delivery or publication within the limited time.

Award, when published.

In general, when an award has been delivered as his award, the arbitrator is *functus officio*, and cannot afterwards alter it even to correct a mistake, unless the parties will concur in referring the award back to him to correct the mistake. (*h*) But where the arbitrator attempted to alter the award, and it was still legible in its original state, it was allowed to operate accordingly, the alteration being considered a wrongful but inefficacious spoliation. (*i*) The Court cannot interfere to *alter the terms of an award*, in order to make them consist with the submission, even where the submission to arbitration gave minute directions for the course to be pursued by the arbitrator. (*k*) And where a barrister awarded that the plaintiff had no cause of action, and that a verdict should be entered for the defendant, and then *by mere mistake of the names*, directed that the costs of the reference and award should be paid by the "*defendant*," meaning the plaintiff; although these facts were disclosed by the arbitrator's certificate and by affidavits, yet it was held that the arbitrator having executed his award in this form, could not rectify it. (*l*) Hence, the greatest care should be observed in drawing up an award. With reference to the

No amendment of an award.

(*f*) *Semble*, and see *Matter of Robson v. Railstone*, 1 B. & Adolph. 723.

(*g*) *Musselbrooke v. Dunkin*, 9 Bing. 605; 4 East, 584; 6 East, 310.

(*h*) 7 Dowl. & Ry. 774.

(*i*) 6 East, 509; 8 East, 54; 11 East, 369.

(*k*) *Hall v. Alderson*, 2 Bing. 476.

(*l*) *Ward v. Dean*, 3 B. & Adolph. 234. And where a barrister, in summing up the items proved before him as

arbitrator, misadded them, and thereby by mistake omitted 23*l*. in favour of the plaintiff, the Court, even at the instance of the barrister, would not allow an amendment, the defendant's counsel objecting. In matter *Pullen*, M. S. M. T. A. D. 1825. But see, as to omission of a sum by mistake, *Rogers v. Dallimore*, 6 Taunt. 111, and *Anonymous*, 2 Chit. R. 44.

CHAP. III.
OF REFERENCES
TO ARBITRA-
TION, &c.

practice in granting new trials, and to the ancient statutes of Jeofails, amendments of obvious mistakes should be permitted by some express enactment.

Fifteenthly,
Of setting aside
awards.

An award having been made and published, the first consideration on the part of the person prejudiced by it, should be, whether by any and what means it can be set aside. If the submission cannot by its terms be made a rule of Court, then the only course will be to resist an action, or to file a bill in equity, and the grounds are but few upon which relief can be obtained; and if the award be seemingly upon the *face* of it correct, relief upon the merits, or *facts*, can rarely be obtained, excepting indeed in cases of *fraud*, or *grossly corrupt or irregular misconduct of the arbitrator*.

But our observations will here be confined to those most frequent submissions, which provide that they shall be made a *rule of Court*. In those cases the statute authorizes relief “where any arbitration or umpirage has been procured by *corruption or undue means*, so as complaint of such corruption or “undue practice be made in the Court where the rule is made “for submission to such arbitration or umpirage, *before the last day of the next term after such arbitration or umpirage made and published to the parties.*” (m) It is therefore incumbent on the party objecting to an award, to make the submission a rule of the proper Court, if not already done by himself or the opponent, and then to move the Court *before the expiration of the prescribed time*; and if he miss that time, neither a Court of Law nor of Equity has in general power to interfere; though if the award be illegal *on the face of it*, it may not be enforceable. In general, a party objecting to an award should move to set it aside *as soon as practicable*, for there are many cases where valid objections to the award would nevertheless form no answer to an application to enforce its performance. (n)

Upon what
grounds an
award can or
not be set aside
on motion. (o)

The principles and grounds upon which relief against an award will be granted or refused, are the same at law as in equity, and the decisions will therefore in general be analogous and equally applicable. The statute 9 & 10 W. 3. c. 15. s. 1, as regards *awards made a rule of Court*, enacts, that the disobedience may be treated as a contempt of Court, and process accordingly may be issued, and which shall not be stopped or delayed by any order, rule, command or process, of any other

(m) See the statute, *ante*, 81, 82.

(n) *Brazier v. Bryant*, 3 Bing. 167;
Dick v. Milligus, 4 Bro. C. C. 117; 2

Ves. J. 23, and *post.* 123, note (o).

(o) See in general, Tidd. Prac. 9th ed. 841 to 847, and Supplements.

Court of Law or Equity, “ unless it be made appear on oath that
“ the arbitrator or umpire *misbehaved* themselves, *and* that such
“ award was procured by *corruption or other* UNDUE MEANS.”
This enactment was clearly intended to give a summary and *final*
jurisdiction, and to preclude appeal, excepting in the two cases
of *corruption*, or *undue means*; but as the latter words are
capable of very extensive construction, that circumstance has
given rise to very various decisions.

A Court of *Equity* will not, upon a bill filed, set aside an
award on a question of *fact*, excepting for *corruption*, *partiality*,
or *irregularity of conduct*, in the arbitrator; (*p*) and evidence
of the *merits* is only to be received so far as it may throw light
on the conduct of the arbitrator, in order to establish one of
those objections; (*q*) for, as regards the investigation of *fact*,
it is a principle in all the Courts to abide by the decision of the
judge, chosen by the parties themselves to decide upon the *facts*,
although such decision be clearly shewn by affidavits to have
been erroneous (*r*). And when the arbitrator is a *Barrister*, they
will also suppose that the parties selected him to decide upon
the law between them; (*s*) and therefore, in such case, the Court
will not set aside the award, on the ground of a *mistake* in point
of *law*; (*t*) or on account of his having incorrectly rejected or ad-
mitted the evidence of a witness; (*u*) and such an arbitrator may
relieve against a *harsh right*, although the same must, in a Court
of justice, have prevailed. (*v*) It has indeed been laid down, that
where legal rights are referred to arbitration, the award must be
according to law, or it will not be binding. (*w*) But when a
matter has been referred to a barrister, this must be understood
with considerable qualification; and the rule seems rather to be,
that if such barrister, under a general reference, *meaning to*
decide according to law, should mistake the law, then the Court
may set aside his award; but that in general, when he being
fully aware of the law, nevertheless thinks fit to decide *against*
the same, or rather refuses to apply it to the facts before him,
then the award, though not according to law, cannot on that

(*p*) *Goodman v. Sayers*, 2 Jac. & W. 249; *Morgan v. Mather*, 2 Ves. J. 15.

(*q*) *Id.* 259.

(*r*) *Id.* *ibid.*; and see a strong case, where 380*l.* were awarded against a tenant for life, for not repairing; and on motion to set aside the award, affidavits established that pending the reference all requisite repairs had been done, yet the Court refused relief; *Brown v. Brown*, 1 Vern. 157; 2 Ch. Cas. 140, S. C. But sometimes after discovered evidence has induced the Court to relieve, *Eardley v.*

Otley, 2 Chit. R. 42, *post* 120, note (*q*).

(*s*) *Wood v. Griffith*, 1 Swanst. 43 to 55.

(*t*) *Stiff v. Andrews*, 2 Mad. 6; *Ridout v. Paris*, 3 Atk. 494; *ante*, 107, 8.

(*u*) *Campbell v. Twemlow*, 1 Price R. 81; *Perryman v. Steggall*, 9 Bing. 679; 1 Chit. Rep. 674; *ante*, 107, 8.

(*v*) *Knox v. Symmonds*, 1 Ves. J. 369; 3 Bro. C. C. 358, S. C.

(*w*) *Blenverhasset v. Day*, 2 Ball & B. 120.

CHAP. III.
OF REFERENCES
TO ARBITRA-
TION, &c.

account be impeached. (x) But if an arbitrator exceed his jurisdiction, then as regards the excess, his award may be set aside, and this where it was *verbally* agreed by the parties, that he might award on granting a lease, the verbal covenant being void by the statute against frauds. (y)

As to *what Misconduct* of an arbitrator may induce a Court to set aside his award, it will be obvious that it ought to have been of such a nature as probably to have affected the decision *on the merits and justice* of the case, at least that is the rule in the Court of Chancery; (z) as if the arbitrator proceed without due notice of the meetings before him (a), or examine premises in the absence of the parties, (b) or if a party, even so late as two or three days before the time for making the award expired, requested the arbitrator to defer making his award until he should satisfy him as to some things which the arbitrator took to be against him, and the arbitrator refused. (c) So where the arbitrator promised to hear witnesses, but made the award before he had heard them; (d) so where an arbitrator received evidence after having given notice to the parties that he would receive no more, and this in the absence of a party who, if present, might by examination have qualified such evidence. (e) So, private meetings of the arbitrators with one of the parties, and admitting him to be heard, to induce an alteration in the award, was considered such partiality, as to vitiate and induce the Court to set aside the award; (f) and where it appeared that the arbitrators were interested in the cargo touching which the award was to be made, the Court set the award aside. (g)

But although it has been decided that all the witnesses of the party, against whom an award is made, should regularly be examined, and in his presence, if he require, so that he may have them cross-examined, or it would be ground for setting aside the award, (h) yet in a subsequent case it was ruled, that the *mode of conducting* an arbitration must be left to the arbitrators; and that if they, after the first or second meeting, *exclude* both the parties and their attorneys, and examine witnesses privately, at their [the witnesses] houses, it seems that such conduct is

(x) See *at law*, *Cramp v. Symons*, 1 Bing. 104; 7 Moore, 434; and in *equity*, *Young v. Waller*, 9 Ves. 364; *Ching v. Ching*, 6 Ves. 292.

(y) *Walters v. Morgan*, 2 Cox, 369; 9 Moore, 388.

(z) *Lingood v. Eade*, 2 Atk. 501, 504.

(a) *Anonymous*, 2 Chitty R. 44; 1 Salk. 71.

(b) *Id. ibid.*

(c) *Spettigew v. Carpenter*, 3 P. W. 362; 1 Dick. 66, S. C.; *sed quare*.

(d) *Earl v. Stocker*, 2 Vern. 251.

(e) *Walker v. Frobisher*, 6 Ves. 70.

(f) *Barton v. Knight*, 2 Vern. 514.

(g) *Earl v. Stocker*, 2 Vern. 251.

(h) 4 Price, 232.

no ground of objection, provided it does not proceed from *corrupt motives*: and that, at all events, if either party would take advantage of it, he must give notice *at the time*, that he intends to rely on it as an objection; and if he lie by and suffer other meetings to take place, and when the arbitrators are ready to make their award, revoke his submission, he is liable in an action to the other party, who was desirous of having the benefit of the award. (i)

But although it is *irregular* for two arbitrators to meet without notice to the third arbitrator, yet that objection is not a sufficient ground to set aside the award, when the substance was settled in his presence; (k) nor would the admission of an arbitrator, that if he had seen a mislaid letter, afterwards found, he would have awarded differently, be sufficient to induce a Court to interfere. (l) Nor will an award be set aside on the ground that the arbitrator has been *assisted* in his conclusions upon fact or law by the opinion of others. (m) Nor will an erroneous recital in an award vitiate, unless it should necessarily lead to a conclusion, that the arbitrator has made a material mistake. (n) And we have seen that a distinct award upon two or more subjects, with a decision as to one upon the face of the award incorrect, or beyond the jurisdiction, will, unless the whole is necessarily connected, only vitiate the incorrect part of the award; and only that part will be set aside. (o) In general, it is required that a material mistake in fact or law, admitted by an arbitrator to have been made, must be verified by some written document, and not merely established by affidavit; but to construe that rule rigidly, would be a protection for concealed error, however gross and unjust.

In equity, it is a principle that no bill will lie to set aside an award on a question *of fact* within the province of the arbitrators, and decided by them, because they are the judges chosen by the parties. And as the statute supposes only two cases of relief, *viz.* an award obtained by *corruption, or undue means*, no Court of Law or Equity has any cognizance of the matter in any *other case* by way *of appeal* from the arbitrator's decision; and the consequences of assuming such a jurisdiction would be most mischievous, and if allowed to be assumed, the result would be, that applications to set awards aside, upon the

(i) *Hewlett v. Laycock*, 2 Car. & P. 574. Per Abbott, C. J. *sed quære*.
 (k) *Goodman v. Sayers*, 2 Jac. & W. 261.
 (l) *Anderson v. Darcy*, 18 Ves. 447.
 (m) *Hopcroft v. Hickman*, 2 Sim. & Stu. 130; *Emery v. Wase*, 5 Ves. 848.
 (n) *Watkins v. Philpotts*, 1 M'Clel. & Young, 397, 399.
 (o) *Hartnell v. Hill*, Forrest Rep. 75; 9 Moore; 2 Young & J. 115; 2 Mad. Ch. Pr. 714.

CHAP. III.
OF REFERENCES
TO ARBITRA-
TION, &c.

merits, would be continually made upon very frivolous grounds. (p) It is therefore established, that a Court of Equity will not interfere to set aside an award except for *corruption*, *partiality*, or *irregularity* of conduct in the arbitrators; and evidence of the merits is never permitted for the purpose of shewing what the merits were, excepting as they may tend to shew such a case of *misconduct*, on the part of the arbitrators, as would give a Court of Equity *jurisdiction*. And although it is irregular for two of three arbitrators to meet, and still more to sign an award, without notice to the third; yet that is not a sufficient ground to set aside the award when the *substance* was settled in his presence (p).

And though cases of *newly discovered* evidence, or of *fraud*, may induce a Court of Law or Equity to open an award upon a matter of fact, still the party must come to the Court promptly and within the statutable time. (q)

Exceptions in
practice.

Such are the general *assigned rules* respecting the interference of the Courts; but it must be confessed, that in the application of these rules, there is not so much *certainty*. For when even barristers have made awards, either mistaken in law or in fact, if, after hearing the affidavits on both sides, it is manifest that *injustice* to any *considerable* extent would be suffered if the award should be allowed to stand, the Court will sometimes, in favor of justice, deviate from the general rule, and set aside the award; so that, in cases of gross mistake or injustice, it may be at least prudent for the party affected, to endeavour to obtain relief.

When, or not,
the Court will
interfere to set
aside an award,
void on the
face of it.

Where an award is void upon the face of it, and nothing could be done upon it without suit, the Court will not interfere to set it aside, because such suit must fail; and it would, consequently, be unnecessary and useless to set aside any instrument that cannot prejudice. But where a cause has been referred by order of *Nisi Prius*, and the arbitrator had power to order a verdict to be entered for either party, and he erroneously makes an award ordering a verdict to be entered, then, although such award be void, the Court would set it aside; for, otherwise, the party against whom it was made, would have judgment against him upon the verdict without the possibility of redress. (r)

Not after a
party objecting
has adopted an
award.

A party, after receiving the costs of a reference and award, which by the terms of a rule of reference were to be paid by the other party, cannot move to set aside the award. (s)

(p) Per Master of Rolls, *Goodman v. Sayers*, 2 Jac. & W. 249, 259.

(q) *Eardley v. Otley*, 2 Chitty's Rep. 42; *Auriol v. Smith*, 1 Turn. & Russ. 127; *Mitchell v. Harris*, 2 Ves. J. 135;

4 Bro. C. C. 3.

(r) *Doe dem. Turnbull and others v. Brown*, 5 Bar. & C. 384.

(s) *Kennard v. Harris*, 2 Bar. & Cres. 801.

The motion to set aside an award, we have seen, must be before the last day of the term next after the time of making the award; (t) and where a cause has been referred by order of *Nisi Prius*, a motion to set aside the award must be made within the time allowed for moving for a new trial, unless a sufficient reason for delay be shewn. (u) So that when an award upon such an order has been made in vacation time, the party objecting should move within the first four days of the next term; and, in other cases, before the rule for judgment has expired. (u) Where an award was made after the essoign day of a term, but before the *quarto die post*, it was held, that it was made within the term, and that a motion to set it aside might be made at any time before the last day of the term *next* following. (v) The statute is construed strictly in equity, as well as at law; (w) and although the defendant gave the plaintiff to understand he intended to move to set aside an award between them, and thereby the plaintiff, who intended to make the same motion, was induced to allow a term to elapse, and then moved, the defendant having omitted to do so: this was held to be no sufficient excuse for the delay. (x) And where accounts, between trustee and *cestui que trust*, were referred to arbitration, and the submission was made a rule of a Court of Law, then, although there had been fraudulent misrepresentation by the trustee to the arbitrator, as to particular items of the account, yet it was decided that a bill in equity could not be maintained by the *cestui que trust* after the time limited by the statute had elapsed to set aside the award, as to the items impeached, leaving it to stand as to the remaining items; the award, upon the face of it, being entire; for though the Court might, where there was a palpable objection upon the *face of an award*, refuse to *enforce* it, they could not set it aside after the time limited by the statute had expired. (y) We have further seen, that a party who intends to move to set aside an award, must take care to do nothing which in part adopts it, as the receiving awarded costs. (z)

CHAP. III.
OF REFERENCES
TO ARBITRA-
TION, &c.

Time, within
which to move
to set aside.

Before any proceedings at law or in equity, to set aside an award, the submission must be made a rule of the Court in which the motion is to be made; (a) though an award made

Practical pro-
ceedings to set
aside awards.

Submission
must be made
a rule of Court.

(t) 9 & 10 W. 3, c. 15, s. 2, *ante*, 81, 82.

(u) *Ramshaw v. Arnold*, 6 B. & Cres. 629.

(v) *In re Burt*, 5 Bar. & Cres. 668.

(w) Cowp. 23; 2 T. R. 781; 1 East, 276; 8 East, 465; 1 Moore, 471; 9

Ves. 453.

(x) *Emet v. Hogden*, 7 Bing. 258.

(y) *Auriol v. Smith*, 1 Turn. & Russ. 121, 126.

(z) *Ante*, 120, and *Kennaird v. Harris*, 2 B. & Cres. 801.

(a) *Chicot v. Lequesne*, 2 Ves. 315.

CHAP. III.
OF REFERENCES
TO ARBITRA-
TION, &c.

Rule *nisi*, when
must state the
objections.

under an order of the Court of Chancery, need not be made a rule of that Court, although there be also bonds of arbitration executed in pursuance of such order. (*b*)

At law and in equity, the objections against an award ought to be specified in the rule *nisi*, obtained for the purpose of setting it aside; (*c*) but an omission in that respect is not conclusive to preclude the Court from entertaining the objections. (*d*) But where a cause, and all matters in difference, were referred to arbitration, and a motion was made to set aside the award, on the ground that the arbitrator had not decided upon certain matters in difference: it was held, that it was not necessary to state these matters in the rule, inasmuch as they were specified in the affidavit upon which the rule was obtained. (*e*) And in moving to set aside an award made under a rule of Court, the rule *nisi* ought to be drawn up on reading the prior rule under which the matter was referred, and the objections to the award ought to be specified. (*f*) In all the Courts, by the established rules of practice, questions on awards are not to be moved for, argued, discussed, or heard, on the *last* day of the term. (*g*) If a motion for setting aside an award be made on slight grounds, the rule will in general be discharged with costs (*h*).

Sixteenthly,
Proceedings to
enforce per-
formance of an
award.

1. By attach-
ment.

Sixteenthly, The party in whose favour an award has been made, has in general the choice of two modes of enforcing obedience, as *first*, by motion for an *Attachment*; or, *secondly*, by *Action*. If he adopt the former, he should first see that the submission has been made a rule of the proper Court, according to the terms of submission, and that such rule has been duly shown to the party, and a copy thereof left; also that the original award has been shown to the party; and it would be advisable also that a copy thereof should be left; and also in case of taxed costs the original *allocatur* should be shown to the party, and a copy thereof left; also that a demand of payment or of performance has been made personally upon the party who ought to perform, and by the party in person to whom the payment or performance ought to be made, or by a person to whom a power of attorney has been duly executed, authorizing and re-

(*b*) *Marquis Ormond v. Kynnersley*, 2 Sim. & S. 15.

(*c*) In C. P. *Dicas v. Jay*, 5 Bing. 281, Rule M. 10 G. 4, C. P.; 6 Bing. 348. In Exchequer, Plea and Equity side, *Watkins v. Phillpotts*, 1 M'Clel. & Y. 394; 11 Price 57, S. C.

(*d*) *Dicas v. Jay*, 5 Bing. 281; 2

Moore & P. 448; but note that was before the Rule 10 Geo. 4, *supra*, note (*c*).

(*e*) *Ramshaw v. Arnold*, 6 Bar. & C. 629; *sed quære*.

(*f*) *Christie v. Hamlet*, 5 Bing. 195.

(*g*) *Watkins v. Phillpotts*, 1 M'Clel. & Y. 393.

(*h*) *Snook v. Hellyer*, 2 Chitty R. 43.

quiring payment to him, and who must also produce and show to the party the foregoing documents, and the original power of attorney, (i) and leave with him a copy of the latter (k), and then formal demand of payment or performance must be made by the party so authorized. (k) The next step must be, to make an affidavit of the facts and of all these proceedings, and of the arbitrator's signature to his award, and the time when, and especial care must be taken to verify every enlargement of the time to make the award; also of the execution of the power of attorney, when any part of the proceedings were under the same. (l) Upon such affidavit, and production of the original award, and of the refusal or neglect to comply with the formal request, counsel may be instructed to move for an attachment for disobedience of the rule of Court, by nonperformance of the award. The rule, when for payment of money, is absolute in the first instance, but otherwise is only *nisi*. The Court will not grant an attachment for non-performance of an award, without *personal service*, where the party has another remedy, as by action (m).

Any alleged corruption in the arbitrator, is no answer to a motion for an attachment for nonperformance of an award; (n) for in answer to that proceeding to enforce an award, the party resisting can only object to defects apparent on the face of the award, because the making a motion to enforce an award cannot anticipate *extrinsic* objections. (o) The proper course therefore is, for the party objecting to an award, on account of *extrinsic* objections, to make a distinct motion to set the same aside upon an affidavit showing his objection, which we have seen, must in general relate to the corrupt or irregular conduct of the arbitrator. (p) But when the submission to arbitration was by a deceased party, an award therein cannot in general be enforced by attachment against his personal representative. (q) It has been considered that under the terms of the statute 9 & 10 W. 3, when once the submission has been made a rule of one Court, an attachment cannot be moved for in another Court, although one of the causes referred was depending in the latter (r).

In some cases, especially when the proceeding is by attachment, the opponent would be induced immediately to move to set aside the award; the safe course is, therefore, to wait till the

How opposed.

2. By action.

(i) See the full practice, Tidd, 9th ed. 836, 7.

(k) *Laugher v. Laugher*, 1 Crompt. & Jerv. 398.

(l) *Id.* *ibid.*

(m) *Lowe v. Johnson*, 4 B. & Ad. 412.

(n) At law, *Brasier v. Bryant*, 3

Bing. 167; S. P. in bankruptcy, *Dick v. Milligan*, 4 Bro. C. C. 117; 2 Ves. J. 23.

(o) *Ibid.*

(p) *Ibid.*

(q) *Willes*, 315.

(r) *Wimpenny v. Bales*, 2 Crompt. & J. 379; *ante*, 92, note (w).

CHAP. III.
OF REFERENCES
TO ARBITRA-
TION, &c.

time for moving the Court under the statute, has expired, or till after the end of the second term, and then to proceed in an action, because in such action the defendant could not, by plea or otherwise, avail himself of any objection on account of the award having been obtained by corruption or undue means. (r) If the award was to pay or repay a sum of money on *demand*, there should be a preceding demand, and which must also be stated in an affidavit to hold the party to bail. (s) The rest of the practice in enforcing an award, has been so fully and ably stated by Mr. Tidd, in his *Practice*, and Mr. Watson, in his *Treatise on Arbitration*, that it is considered to be unnecessary here to repeat the same.

Seventeenthly,
Jurisdiction in
equity. (t)

Seventeenthly, Although it has been doubted whether Courts of Equity have any jurisdiction under the 9 & 10 W. 3, the first section of which speaks of *Courts of Record*; it seems now to be clearly established, that the act extends to the Court of Chancery, and that an agreement that a submission shall be made a rule of Court, may be given effect to by an order or rule of the *Court of Chancery*, so as to move that Court to enforce the award, or to set it aside; (u) and it seems that that Court in which the submission is first made a rule, acquires the exclusive jurisdiction. (v) But if the submission has merely provided, that the agreement to refer shall be made a rule of a Court of *Law*, then a Court of Equity cannot proceed after such rule has been obtained, (w) unless the Court of Law, as sometimes occurs, will alter the terms of their rule and permit a suit in equity. (x) And where, although a bill had been filed to set aside an award before the submission had been made a rule of the Court of King's Bench; it was held that after such rule had been obtained, equity had no jurisdiction, although by the terms of the submission, it *might* originally have been made a rule of the Court of Chancery; (y) and *e converso*, on the other hand, when by consent an order has been made in Chancery to refer a suit to arbitration, no other Court has jurisdiction over an award made in pursuance thereof; (z) and in general, an

(r) Defendant cannot *plead* corruption or partiality, 8 East, 344; 5 B. & Cres. 534; Gow's Cases Ni. Pri. 5.

(s) *Diver v. Hood*, 7 Bar. & Cres. 494.

(t) See in general Chitty's Eq. Dig. tit. Arbitrator.

(u) *In matter of Joseph and Webster*, 1 Russ. & M. 498, note (a); *Dawson v. Sadler*, 1 Sim. & Stu. 537; and see 2 Madd. Ch. Pr. 712, 713, *accord*; Tidd, 9th ed. 821, *contra*.

(v) *Dawson v. Sadler*, 1 Sim. & Stu. 537.

(w) *Lord Lonsdale v. Littledale*, 2 Ves. J. 451; *Davis v. Getty*, 1 Sim. & Stu. 411; *Gurnett v. Bannister*, 14 Ves. 530; 2 Madd. Rep. 6; 2 Jac & W. 249.

(x) *Lonsdale v. Littledale*, 2 Ves. 453.

(y) *Davis v. Getty*, 1 Sim. & Stu. 411; *Dawson v. Sadler*, 1 Sim. & Stu. 537.

(z) *Pitcher v. Rigby*, 9 Price, 79.

award in a suit depending in a particular Court, has been considered not within the statute. (a) But nevertheless, a general reference to arbitration, made by parties in a suit then depending in Chancery, may be, and frequently is made an order of a Court of Law; (b) and in general, by reference to arbitration, both at law and in equity, the Court divests itself of all jurisdiction over the facts. (c)

It is settled that references, where the submission is to be made a rule of Court, followed up by such a rule, are entirely governed by the statute 9 & 10 W. 3, and which is as imperative upon Courts of Equity as upon Courts of Law, as to the time within which an application to set aside an award must be made; and the statute has transferred the jurisdiction of a Court of Equity in such a case, even of fraud or concealment in one of the parties, altogether to the Court of which the submission has been made a rule of Court; and the parties having selected their own tribunal, and a certain period only being allowed by the statute, they are wholly bound if they suffer that time to elapse, (d) and the statute regulation, as regards time, is as obligatory in equity as at law. (e)

We have in a previous page alluded to some of the statutes *compulsory* on parties to submit to arbitration, or at least affording them a right to *claim a* reference; (f) of this nature is the *Friendly Society Act*, (g) and the *Saving Bank Act*. (h) The acts respecting *masters and servants* in husbandry, or in certain *trades*, either enabling magistrates to hear complaints for nonpayment of wages, (i) or enabling such masters or workmen to demand and have a reference. (k) The acts relating to *Seamen's Wages*, (l) and the *Salvage Acts*, which also afford powers of arbitrating. (m) The consideration of all the powers given by these and other particular acts of the same nature, would extend beyond the subject of this general summary. The acts

Eighteenthly,
Of arbitrations
under other
particular sta-
tutes.

(a) *Lonsdale v. Littledale*, 2 Ves. J. 451; 2 Mad. Ch. Pr. 713.

(b) *Nichols v. Chalie*, 14 Ves. 265.

(c) *Dick v. Milligan*, 2 Ves. J. 24.

(d) *Auriol v. Smith*, 1 Turn. & Russ. 124, 5, 6.

(e) *Godfrey v. Boucher*, 3 Vin. Ab. 139, pl. 38, *contra* to *Allardes v. Campbell*, Bunb. 265.

(f) *Ante*, 74.

(g) 10 G. 4. c. 56, s. 27.

(h) 9 G. 4, c. 92, s. 45, *Compulsory*, and no action lies, *Crisp v. Bunbury*, 8 Bing. 394.

(i) 4 G. 4, c. 34; 10 G. 4, c. 52; Burn J. Servants, xviii; *semble*, an *infant* is not within the 3d section of that act, Hawk. P. Cr. chap. 64, sect. 35.

(k) 5 G. 4, c. 96, s. 3, Burn J, tit. Servants, xxi.

(l) Abbott on Shipping; Burn J. tit. Seamen, 59 Geo. 3, c. 58; *Ship Minerva*, 1 Hag. Rep. 56.

(m) 1 & 2 Geo. 4, c. 75; and see *Jonge v. Nicholas*, 1 Hagg. 201; and see other statutes, Burn J., Wreck; Abbott on Shipping.

CHAP. III.
OF REFERENCES
TO ARBITRA-
TION, &c.

are full and explicit; and when they give a *power* to demand an arbitration, the provision is construed to be *imperative*, and to preclude parties from suing in cases within the enactments; for otherwise the spirit of litigation, and the desire to have the matter discussed in a superior tribunal, would render the enactments dead letters. (n) But the *Salvage* acts have been expressly holden not to take away the common law *general* right to sue for recompense in those cases. (o)

(n) *Crisp v. Bunbury*, 8 Bing. 394.

(o) 3 Bos. & Pul. 612; but in case of salvage on re-capture, recourse can only be had to a Prize Court, 2 Dougl. 594; 33 Geo. 3, c. 66, s. 42.

CHAPTER IV.

SUMMARY PROCEEDINGS BEFORE JUSTICES OF THE PEACE
FOR PRIVATE INJURIES AND PENALTIES, AND PRACTICAL
DIRECTIONS.*First, THOSE OF A GENERAL NATURE.*

1. For assaults and batteries,
9 Geo. 4, c. 31, s. 27 -
2. Stealings of property, 7 &
8 Geo. 4, c. 29, s. 66 -
3. Malicious injuries to proper-
ty, id. chap. 30, s. 24 -
4. Game Act, 1 & 2 W. 4, c.
32, s. 12, 30 -
5. Construction of these Acts
6. Similarity in the enact-
ments -

*Secondly, PRACTICAL PROCEEDINGS
TO ENFORCE COMPENSATIONS OR
PENALTIES.*

1. Within what time must pro-
secute -
2. Who must or may prose-
cute -
3. Against whom -
4. Before what justice or jus-
tices -
5. The information or com-
plaint -
6. The summons -
7. The service thereof -
8. The search warrant -
9. The warrant to bring offen-
ders before justice, and ap-

- prehension thereon -
10. The evidence and witnesses,
and process to compel at-
tendance -
11. The hearing before the jus-
tices -
12. Of adjournments -
13. The conviction and costs -
14. Of special cases -
15. Of appeals and recognizances
thereon -
16. Of certiorari, and proceed-
ings thereon -
17. Proceedings in execution -
18. Proceedings for restitution
19. Liability of complainant
20. Liability of, and protection
to justices -

*Thirdly, IN CASES OF FORCIBLE
ENTRY AND DETAINER.**Fourthly, IN OTHER CASES.*

1. As between landlord and te-
nant -
1. Rent in arrear, no distress
2. Fraudulent removal -
3. Premises deserted -
4. Paupers' cottages, &c. -
- II. Penalties in general -

WE are in this Chapter to examine *the practical proceedings, to obtain a summary conviction and compensation or punishment, before one or more Justices of the Peace, for small Private Injuries*, whether to the *Person or Personal or Real Property*; and it will be found that the rules here collected, will also in general apply to the practical proceedings to be observed in the recovery before a Justice, of pecuniary penalties, under the very numerous *Penal Statutes*, which impose them as measures of police.

We are to suppose that an injury has been committed, and that the case is either unfit for arbitration, or that any measure of that nature has failed, and that on account of the smallness

CHAP. IV.

SUMMARY PRO-
CEEDINGS, &c.

The subjects of this Chapter are the Practical Summary Pro-
ceedings for
Private Inju-
ries, and Penal-
ties.

Summary pro-
ceedings, when
expedient.

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &C.

of the injury, or of the poverty or station of the complainant, or wrong-doer, it is desirable to avoid formal expensive litigation, and to seek redress by economical and expeditious *summary remedy*. We have seen the risk attending proceedings by *action* in the Superior Courts, for small injuries, in respect of *costs*, especially for assaults, slanders, and small transient trespasses to land or other property; and that unless there be a permanent and valuable right to be tried, and the opponent is certainly able to pay costs, it is most prudent to forbear to proceed at all; or at least most advisable to adopt some *summary proceeding*; and that perhaps rather with a view to *prevent repetition* of the injury, than to recover actual or supposed compensation. The Legislature has considered that it is better to provide *some* summary, speedy and cheap compensation or punishment, than by denying redress, or rendering it so expensive as to be beyond the means of adoption, to induce men to revenge themselves; (a) and therefore, especially of late, has introduced several very useful enactments, extending to almost every description of small private injury, and forming a *new class of jurisdiction delegated to Justices*, and of which we will now take a concise practical view.

Original limited jurisdiction of Justices of the Peace out of Sessions.

Anciently the functions and jurisdiction of one or more Justices of the Peace, when not assembled at general or quarter sessions, were almost entirely *ministerial*, viz., to *preserve* and *prevent breaches of the peace*, and to cause malefactors to be *apprehended*, and their appearance secured, to take their trial for alleged offences before a higher tribunal, either at the assizes or sessions; and the principal exceptions were *Forcible Entries and Detainers*; with respect to which, we shall find that by ancient statutes, one or two justices, though not at Quarter Sessions, had summary judicial powers. In more modern times the increase of population, and still more the increase of legislation, has rendered it essential to delegate jurisdiction over small matters of police to Justices; and in numerous cases, whether for prevention or punishment of breaches of some police regulations, small offenders were subjected to *pecuniary penalties*, and to imprisonment for a short time if they did not pay them; frequently *one* Justice, and in cases of more importance, *two* Justices had power to decide summarily, subject sometimes to an appeal to sessions, but very frequently final without any appeal, and even without the power of the superior Court of King's

(a) See the observations of Treby, *Har- rison v. Thornborough*, Gilb. Cas. L. & Ch. J. cited by Parker, C. J. E. 117; and *ante*, 1 Vol. 23, note (d).

Bench, to review their formal proceedings upon certiorari. A most familiar instance was the proceedings under the now repealed act, 5 Ann, c. 14, for a 5*l.* penalty for killing game without being qualified, where one justice could convict, and there was no appeal, though the writ of certiorari was not taken away.

The small expense incident to this and similar proceedings, before one or more Justices, in still more recent times, at length induced the Legislature to extend this summary jurisdiction, even to cases apparently *wholly foreign* to the object of the *original* institution of Justices of the Peace; viz., enabling them to decide upon questions of *contract* between *masters and servants*, when the latter were *labourers* working for wages, or servants in certain trades. (b)

Jurisdiction
extended to
cases of con-
tract.

The next step was to afford compensation, by the decision of a Justice, for *verbal abuse*, by stage-coachmen to passengers. (c) But there were no regulations affording *general compensation or punishment for small private injuries*, until the three principal statutes were recently passed, viz., the 7 & 8 Geo. 4, c. 29, relative to small *illegal takings* of property, whether strictly personal or in part connected with the freehold, not exceeding 5*l.* in value; the 7 & 8 Geo. 4, c. 30, relative to small *wilful or malicious injuries* to personal or real property, whether private or public, not exceeding 5*l.*; and the 9 Geo. 4, c. 31, relative to *common assaults and batteries*, not causing injury exceeding 5*l.* The former two acts enabling *one Justice* summarily to hear and determine the complaint of the party aggrieved, and award him compensation to the extent of 5*l.* unless when he has given evidence, and then to be paid in aid of the county rate; and the latter act requiring *two* Justices to hear and determine, and convict in not exceeding 5*l.*, to be paid in aid of the county rate.

Extended to
small private
injuries to per-
sons or proper-
ty.

These statutes were enacted with a view to prevent expensive actions in the superior Courts for trifling assaults and trespasses, which could not be proceeded for in the County Court even by *justices*, that Court not having jurisdiction over trespasses *vi et armis*; (d) and it is perhaps to be regretted that general cases of *slander* have not also been provided for. (e) If these statutes be judiciously acted upon, they will render it unnecessary to resort to expensive actions in the superior Courts, when the value of the matter in dispute cannot justify those measures; and as regards

The object of
the recent en-
actments.

(b) 4 Geo. 4, c. 34; 10 Geo. 4, c. 52;
5 Geo. 4, c. 96; Burn's Jus. tit. Ser-
vants.

(c) 2 & 3 W. 4. c. 120, s. 47, 99.
(d) *Ante*, 1 Vol. 23, 24.
(e) *Id.* *ibid.*

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

the proceedings before two Justices for common assaults and batteries, they have rendered unnecessary indictments at the sessions or assizes, unless in cases of assaults with intent to commit a felony, or of an aggravated nature. (f) But still it must be observed that the limited penalty of 5*l.* is to be paid only in aid of the *county rate*; so that the proceeding before two Justices for an assault and battery can in strictness only be for *punishment*, and not directly for private compensation, for the act does not give the two Justices any direct authority to award compensation, although in case of injuries to personal or real property, one Justice, it will be observed, has that power. It should seem, however, that independently of these statutes, the party charged might at any time before conviction, or at least before the hearing, legally compromise with the party aggrieved, and thereby avoid payment of any fine or penalty; and thus the proceeding might operate in all cases as a private satisfaction.

Former and present rules of construction, as regards summary proceedings.

As in all or most of the cases where a penalty or fine is to be paid, the party is subject to *imprisonment* in default of payment, an absurd rule of construction for some time prevailed, as regarded all these summary proceedings, viz. that the proceeding leading to imprisonment without a previous trial by jury was an unconstitutional proceeding, and contrary to Magna Charta; (g) and that therefore a tight hand ought to be held over these summary convictions, and more strictness required in the forms of proceedings and the jurisdiction, and a due exercise of it manifestly appear, and that no intendment in favour of them should be admitted; and that the superior Courts ought to be astute in discovering defects in convictions before summary jurisdictions; and it was even supposed that a different and more rigid rule of averment and evidence in support of summary proceedings should be required than in an action. (h) But these absurdities, the indulgence of which might induce a suspicion that the superior Courts were formerly *jealous* of those inferior jurisdictions, have for some time been abandoned; and now the doctrine is that whether it was expedient that those jurisdictions should have been erected, was a matter for the consideration of the *Legislature*; but that as long as they exist, the Courts ought to go

(f) See exceptions, 9 Geo. 4, c. 31, s. 29; *Anon.* 1 B. & Adolph. 382.

(g) See Lord Holt's observations in *Queen v. Wheller*, and notes, 2 Lord Raym. 842; and *Rex v. Chandler*, 2 Salk. 378; and 9 Hen. 3. c. 29; and the notes in Chitty's Col. Stat. 340; but note, the words of that act are, that no man shall be imprisoned, &c. "but by

"lawful judgment of his peers, or by the law of the land;" consequently an imprisonment by virtue of any legislative enactment, is by the law of the land.

(h) *Id.* *ibid.*; and see *Rex v. Thompson*, 2 T. R. 18; *Rex v. Swallow*, 8 T. R. 284; *Rex v. Stone*, 1 East, 639; *Rex v. Turner*, 5 Maule & S. 206.

all reasonable lengths to support the decisions of Justices, especially as in whatever light they were formerly seen, the country are now convinced that in general they derive considerable advantage from the exercise of the powers delegated to justices, and therefore in modern times they have received proper support from the Courts of Law; (i) and for the same reason the Courts hold, that although in drawing up convictions magistrates cannot set all forms at nought; yet on the other hand they ought not to be entangled in greater forms or ceremonies than the superior Courts; (j) and in one of the latest decisions upon the subject it was established that the same, and not a stricter rule of *evidence* is to be observed before justices, as in the superior Courts; (k) and in a very recent case it appears that when a conviction on the face of it assumes facts so as to bring the case within the jurisdiction of the justice, the Court will not, on a motion for a *certiorari*, and which is taken away by the act, give effect to affidavits denying the facts and showing that the justices ought not to have convicted; because the Legislature, by giving the magistrates power to decide, concluded that they would decide to the best of their discretion. (l) But although a conviction falsely assuming facts may in itself be sustainable and enforceable as well directly as collaterally, so as to subject the party convicted to the payment of the penalty, and preclude him from sustaining any action against the magistrate or other person acting under it; (m) yet if a magistrate were *wilfully and criminally* to mistake or assume facts in order to give himself jurisdiction and convict, he might, by *mandamus*, in certain cases where the statute requires that the conviction shall state the evidence, be compelled to reform his conviction by setting forth the evidence according to the facts, (n) or he would be liable to indictment or criminal information, or at least would be subjected to the animadversion of the Court and the payment of costs of the motion against him, (o) and would probably be justly removed from his office.

It is to be regretted, that considering the very numerous enactments for the recovery of penalties before justices, and the extensive operation of the recent enactments, affording compen-

General precautions to be observed, in adopting summary proceedings before Justices.

(i) Per Ashhurst, J. in *Rex v. Thompson*, 2 T. R. 18.

(j) Per Lord Kenyon, in *Rex v. Swallow*, 8 T. R. 284.

(k) *Rex v. Turner*, 5 Maule & Selw. 206.

(l) *Anonymous*, 1 B. & Adolph. 382.

(m) *Id. ibid.* and *Brittain v. Kinnaird*,

1 Brod. & B. 432; and *Gray v. Cookson*, 16 East, 13.

(n) *In re Rex*, 4 Dowl. & R. 352; *Ex parte Marsh*, *id.*

(o) *Rex v. Barker*, 1 East Rep. 186; see a gross case of neglect of duty, *Rex v. Constable*, 7 Dowl. & R. 663.

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

sation or punishment for private injuries, there is not (excepting in the act enabling *one* justice to receive an information, and issue his summons, and giving a general form of conviction,) (*p*) *any general comprehensive enactment regulating such proceedings*; as the information, summons, service thereof, process against witnesses, hearing before the justices, and other proceedings, establishing one general uniform set of rules to be observed in all cases, with appropriate variations when necessary. From the want of these it will be found that the proceedings are frequently very different. Sometimes the *information* or complaint, we shall find, must be on oath; in other cases, it suffices if it be in writing; and in others perhaps might be verbal. Sometimes also the *summons* must be actually *served on* the party accused himself; at others, may be left at his *abode*, and in others may be served on any *inmate*; and the other proceedings also vary. So that this general caution must be observed, that in each case the particular statutes applicable to the case must be carefully read and their provisions pursued; and if of doubtful import, then in prudence an excess of care should be adopted. And although the magistrate himself might be disposed to take upon himself the direction of all the proceedings, yet every prudent individual should be prepared to lay before the magistrate the best forms to be adopted in all stages of the proceeding, and with that view the following directions are given. We will first consider the terms of the principal recent enactments of a general nature or of most practical importance, and then state the practical proceedings in regular order.

First, Summary proceedings for a common assault or battery, on 9 Geo. 4. c. 31. s. 27.

First, *Common Assaults and Batteries*.—The 9 Geo. 4, c. 31, s. 27, after reciting that it was expedient that a summary power of *punishing* persons for *common assaults and batteries* should be provided under the limitations thereafter mentioned, enacts “that where any person shall unlawfully assault or beat any other person, it shall be lawful for *two justices* of the peace, *upon complaint of the party aggrieved*, to hear and determine such offence; and the offender, upon conviction thereof before them, shall forfeit and pay such fine as it shall appear to them to be meet, not exceeding, together with costs (if ordered), the sum of five pounds, which fine shall be paid to some one of the overseers of the poor, or to some other officer of the parish, township or place in which the offence

(*p*) 3 G. 4, c. 23, s. 1, 2 & 3.

“ shall have been committed, to be by such overseer or officer
 “ paid over to the use of the general rate of the county, riding,
 “ or division in which such parish, township or place shall be
 “ situate, whether the same shall or shall not contribute to such
 “ general rate; and that the evidence of any inhabitant of the
 “ county, riding or division shall be admitted in proof of the
 “ offence, notwithstanding such application of the fine incurred
 “ thereby; and if such fine as shall be awarded by the said
 “ justices, together with the costs (if ordered), shall not be paid
 “ either immediately after the conviction or within such period
 “ as the said justices shall at the time of the conviction appoint,
 “ it shall be lawful for them to commit the offender to the com-
 “ mon gaol or house of correction, there to be imprisoned for
 “ any term not exceeding two calendar months, unless such fine
 “ and costs be sooner paid; but that if the justices, upon the
 “ hearing of any such cause of assault or battery, shall deem
 “ the offence not to be proved, or shall find the assault or bat-
 “ tery to have been justified, or so trifling as not to merit any
 “ punishment, and shall accordingly dismiss the complaint, they
 “ shall forthwith make out *a certificate* under their hands,
 “ stating the fact of such dismissal, and shall deliver such certi-
 “ ficate to the party against whom the complaint was preferred.”

The 28th section then enacts, that “ if any person against
 “ whom any such complaint shall have been preferred for any
 “ common assault or battery, shall have obtained such certificate,
 “ or having been convicted shall have paid the amount adjudged
 “ to be paid, or shall have suffered imprisonment for non-pay-
 “ ment thereof, he shall be released from all further proceedings
 “ for the same cause.” The section 29 provides and enacts that
 these provisions are not to apply to cases of assault or battery
 which the justices shall find have been accompanied by *any*
attempt to commit felony, (q) or which they shall be of opinion
 is a fit case to be the subject of indictment, and that they shall
 then abstain from convicting, and shall deal with the case in
 the same manner as they would have done before the passing of
 the act, viz. direct a prosecution at the sessions. And the same
 section also provides that justices of the peace are not to hear
 and determine any case of assault or battery in which any ques-
 tion shall arise as to the *title* to any lands, tenements or heredi-
 taments, or any interest therein or arising therefrom, or to any

(q) See *Anonymous*, 1 B. & Adolph.
 382. This section obviously, by the
 terms “ which the justices shall find,

&c.” gives them unlimited discretion to
 proceed or not in such cases.

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

bankruptcy, insolvency or execution under the process of any Court of Justice.

The 33d section enacts that where any person shall be charged on the oath of a credible witness, before *any justice* of the peace, (s) with any such offence, the justice may summon the person charged to appear before any two justices of the peace, at a time and place to be named in such summons, and if he do not appear, then, upon proof of the due service of summons upon such person *by delivering the same to him*, the justices may either proceed to hear and determine the case *ex parte*, or may issue their *warrant for apprehending* such person and bringing him before them, or the justice before whom the charge shall be made may (if he shall so think fit) issue such *warrant* in the first instance, without any previous summons.

The 34th section enacts that prosecutions under the act punishable on summary conviction shall be commenced within *three calendar months* after the commission of the offence. The 35th section enacts that the justices *may* cause the conviction to be drawn up in the subscribed or *in any other form* of words to the same effect. (t)

The 36th section enacts that no conviction shall be quashed for want of form, (u) or be removed by *certiorari*, or otherwise, (v) into any of his Majesty's superior Courts of Record; and that no warrant of commitment shall be held void by reason of any defect therein, provided it alleges that the party has been *convicted*, and there be a valid conviction to sustain the same. (w)

(s) This provision enabling one justice to receive the information, and issue his summons, is a repetition of the general enactment in 3 Geo. 4, c. 23, s. 2.

(t) Be it remembered, that on the — day of —, in the year of our Lord —, at —, in the county of [or riding, division, liberty, city, &c. *as the case may be*] A. O. is convicted before us [naming the justices], two of His Majesty's justices of the peace for the said county, [or riding, &c.] for that he the said A. O. did [specify the offence, and the time and place when and where the same was committed, *as the case may be*], and we the said justices adjudge the said A. O., for his said offence, to be imprisoned in the —, and there kept to hard labour for the space of —, [or we adjudge the said A. O., for his said offence to forfeit and pay the sum of] [here state the amount of the fine imposed], and also to pay the sum of — for costs; and in default of immediate payment of the said sums, to be imprisoned in the —, for the space of

—, unless the said sums shall be sooner paid [or we order that the said sums shall be paid by the said A. O. on or before the — day of —]; and we direct that the said sum of — [*viz. the amount of the fine*] shall be paid to —, of — aforesaid, in which the said offence was committed, to be by him applied according to the directions of the statute in that case made and provided; and we order that the sum of —, for costs shall be paid to C. D. [*the party aggrieved*]. Given under our hands the day and year first above mentioned.

(u) This is a repetition of the general enactment in 3 G. 4, c. 23, s. 3.

(v) In general all summary proceedings are removable by *certiorari*, unless expressly taken away; see *post*, and 1 Stra. 67; 6 East, 514; *Rex v. Cashio-bury*, 3 Dowl. and R. Mag. Cases, 485; *Rex v. Hanson*, 4 B. and Ald. 521.

(w) This enactment was to avoid the effect of the decision in *Wicks v. Chatter-buck*, 2 Bing. 483.

Prescribed
form of con-
viction in 9
Geo. 4. c. 91.

It will be observed that this act 9 Geo. 4, c. 31, as respects summary proceedings by conviction for common assaults and batteries before *two* justices, does not require a complaint on oath, or even in writing, but there must be an oath before issuing any summons or warrant; and it contains no clause authorizing an *appeal*, and consequently, according to the general rule, there can be no appeal; (x) and as the writ of *certiorari* is expressly taken away, the decision of *two* justices in these cases is final.

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

As respects the *illegal taking* of personal property, or things annexed to the realty, when not indictable, almost every possible injury in the nature of an *illegal taking*, is remediable or punishable before one or more justices, under the 7 & 8 Geo. 4, c. 29.

Secondly, Pro-
ceedings for
taking personal
property, trees,
fences, &c.,
not felony or
misdemeanor
on 7 & 8 G. 4,
c. 29.

The 7 & 8 Geo. 4, c. 29, s. 30, enacts, that the *unlawfully and wilfully* taking or killing any *hare or cony* in the *day-time*, in any *warren or ground, lawfully used* for breeding or keeping of hares or conies, whether inclosed or not, shall subject the offender to the payment of not exceeding 5*l.*, on conviction before *one* justice. (y)

The *stealing* any *dog or beast or bird, ordinarily kept in a state of confinement*, (z) and not the subject of larceny at common law, subjects the offender to not exceeding 20*l.* for the first offence, on conviction before *one* justice, and imprisonment for twelve calendar months with hard labour; and for the second offence, on conviction before *two* justices, the like punishment, and if a male offender, also whipping. (a)

The unlawfully and wilfully killing, wounding, or taking any *house dove or pigeon*, under such circumstances as shall not amount to larceny at common law, subjects the offender on conviction before *one* justice, to forfeiture of the value of the bird, and not exceeding 2*l.* (b)

The provisions relative to the taking of fish, are somewhat complex, depending on the exact description of the place and water where the same were taken. The unlawfully and wilfully taking or destroying, or attempting to take or destroy, any *fish* in any water, (not being water running through, or being in any land adjoining, or *belonging to the dwelling-house of any*

(x) *Res v. Hanson*, 4 B. and Ald. 521; 1 Maule and Selw. 448; 1 Stra. 67; 6 East, 514, Com. Dig. Justices Peace, c. 3; Dougl. 549.

(y) 7 & 8 G. 4, c. 29, s. 30, as to game in general; see 1 and 2 W. 4, c. 32, *post*, 142.

(z) This act extends to the stealing a ferret or other animal usually confined, although not indictable; *Res v. Searing*, Russ. & R. C. C. 350; *ante*, 1 Vol. 88.

(a) *Id.* sect. 31; and see *Lockins*, &c. *id.* sect. 32.

(b) *Id.* sect. 33.

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

*person, (c) being the owner of such water, or having a right of fishery therein,) (d) but which shall be private property, or in which there is a private right of fishery, subjects the offender on conviction before one justice, to pay the value of the fish taken or destroyed, not exceeding 5*l.* (e) Angling in the day-time is excepted from that regulation; but an offender by angling in the day-time in the *excepted* water, is liable on conviction before one justice, to pay not exceeding 5*l.*; and if the angling has been in water not above excepted, then such *offending* angler is subject on conviction before one justice, to not exceeding 2*l.* penalty. (f) But then it is provided, that if the tackle of the fisher has been seized under the authority given by the act, he shall not be liable to pay any damages or penalty. (g)*

The act then contains numerous penalties against *stealing trees, shrubs, alive and dead fences, stiles, gates, fruit, vegetables, and other things*, recoverable as therein directed, before one or two justices. (h)

Receivers of property, and *abettors*, where the original offence is punishable on summary conviction, are subjected to similar penalties, also recoverable before one justice. (i) The act then gives a power of *apprehending* all such offenders *found committing* any prohibited offence without warrant; (k) and authorizes a justice, upon *oath* of a credible witness of a *reasonable cause*, to suspect that a party has in his possession or on his premises any property whatsoever, on or with respect to which any such offence shall have been committed, to grant his warrant to *search* for such property as in the case of *stolen goods*. (l) The act then limits prosecutions for summary conviction, to *three calendar months* after the commission of the offence, and renders admissible the *evidence* of the party aggrieved, and of any *inhabitant* of the county; (m) although when the testimony of the former has been received on his own behalf, the statute takes away one temptation to perjury, by applying the whole sum awarded in aid of the county rate. (n)

The 65th section then directs the course of proceeding for

(c) This expression has been objected to as uncertain; see *ante*, 1 Vol. 178, 9, 192, 3, where see some constructions.

(d) When in such excepted water, the offence is an *indictable misdemeanor*.

(e) *Id.* sect. 34, 35.

(f) *Id.* *ibid.* *ante*, 192, 3.

(g) *Id.* sect. 34.

(h) *Id.* sect. 38 to 52, stated *ante* 1 Vol. 93, 94, 407 to 412, and cases there noticed. A young fruit tree is not a vegetable production within the meaning of the act, when growing in a garden, &c.

Rex v. Hodges, 1 Mood. and M. 341; *ante*, 1 Vol. 93, 4.

(i) *Id.* sect. 60, 62.

(k) *Id.* sect. 63; and *ante*, 1 Vol. 617 to 633, as to the construction of the words "*found committing*," &c.

(l) *Id.* sect. 63. The cases, therefore, as to *search warrants*, will be applicable; see, in general, Burn J. 26th edit., tit. Search Warrant.

(m) *Id.* sect. 65.

(n) Sect. 66.

the penalty, viz., that where any person shall be charged on *the oath* of a credible witness, before a justice, with any such offence, the justice may *summon* him, and if he shall not appear accordingly, then (upon proof of the due *service* of the summons upon such person, by delivering the same to him *personally, or by leaving the same at his usual place of abode.* (o) The justice may proceed to hear and determine the case *ex parte*, or issue his *warrant for apprehending such person*, and bringing him before himself or some other justice; or the justice before whom the charge shall be made, may, (if he shall so think fit), without any previous summons, (unless when otherwise specially directed) issue such warrant; and the justice before whom the person charged shall appear or be brought, shall proceed to hear and determine the case. (p) It should seem, therefore, that to ground a summary proceeding for a penalty under this act, there must be an *information* of the offence *on oath*. Whereas the 9 Geo. 4, c. 31, s. 27, only requires the complaint of the party aggrieved, without directing that the complaint shall be *on oath*, or even in terms requiring it to be in writing, although then also there must be an oath before the summons. (q)

The act then directs, that the sum forfeited for the value of the property stolen or taken, or amount of injury done, shall be assessed by the convicting justice, and shall be paid *to the party aggrieved*, if known, except where such party shall have been examined in proof of the offence; and in that case, or where the party aggrieved is unknown, then such sum shall be applied in the same manner as a penalty, and then shall be paid to one of the overseers of the poor, or other officer of the parish where the offence was committed, to be by him paid over to the use of the county rate; and provides, that where several persons join in the commission of the same offence, and on conviction, shall each have been adjudged to forfeit a sum equivalent to the value of the property or the amount of the injury—in such case no further sum shall be paid to the party aggrieved, than the sum forfeited by one of such offenders only, and the corresponding sum forfeited by the other offenders, shall be applied as thereinbefore directed. (r) The 67th section enacts, that where the person summarily convicted, shall not pay the sum ordered to be paid, the justice may commit him to the common gaol or house of correction, to be impri-

(o) See the difference between the prescribed mode of service in this and in the 9 Geo. 4, c. 31, s. 33; *ante*, 134.

(p) *Id.* sect. 65.
(q) *Ante* 132, 3.
(r) Sect. 66.

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

soned and kept to hard labour, according to the discretion of such justice, for not exceeding two calendar months, where the sum does not exceed 5*l.*; and prescribes the further scale of imprisonment; but the imprisonment is to determine on payment of the sum awarded and costs. (*s*)

The section 68 enacts, that the justice may in certain cases, even after the conviction, discharge the offender upon his *making such satisfaction* to the party grieved for damages and costs, or either, as the justice shall ascertain and fix; (*t*) and by section 69, the King may pardon any person imprisoned under that act; and the 70th section enacts, that when any person summarily convicted under this act shall have paid the penalty, or shall have received a remission thereof from the crown, or suffered imprisonment for nonpayment thereof, he shall be relieved from all further proceedings for the same cause. (*u*) The 71st section allows the form of conviction as in the note (*v*).

The 72d section enacts, that in all cases where the sum adjudged to be paid on summary conviction, shall exceed 5*l.*, or the imprisonment shall exceed one calendar month, or the conviction shall take place before *one* Justice only; any person who shall think himself aggrieved by such conviction, may appeal to the next Court of General or Quarter Sessions, which shall be holden not less than *ten days* after the day of such conviction, provided he shall give to the complainant a *notice in writing of such appeal*, and of the cause and matter thereof,

Prescribed
form of con-
viction in 7 &
8 Geo. 4. c. 29.

(*s*) Id. sect. 57.

(*t*) Id. 68.

(*u*) Id. sect. 70.

(*v*) Be it remembered, that on the — day of —, in the year of our Lord —, at —, in the county of —, [*or riding division, liberty, city, &c., as the case may be*], *A. O.* is convicted before me, *J. P.*, one of His Majesty's Justices of the Peace for the said county [*or riding, &c.*], for that he the said *A. O.* did [*specify the offence, and the time and place when and where the same was committed, as the case may be, and on a second conviction state the first conviction*]; and I the said *J. P.* adjudge the said *A. O.* for his said offence, to be imprisoned in the —, [*or to be imprisoned in the —, and there kept to hard labour*] for the space of [*or I adjudge the said A. O. for his said offence, to forfeit and pay £. [here state the penalty actually imposed, or state the penalty, and also the value of the articles stolen, or the amount of the injury done, as the case may be]*], and also to pay the sum of — for costs; and in default of immediate payment of the said sums, to

be imprisoned in the — [*or to be imprisoned in the —, and there kept to hard labour*], for the space of — unless the said sums shall be sooner paid; [*or, and I order that the said sums shall be paid by the said A. O. on or before the — day of —*], and I direct that the said sum of — [*i. e. the penalty only*] shall be paid to — of —, aforesaid, in which the said offence was committed, to be by him applied according to the directions of the statute in that case made and provided, [*or that the said sum of — [i. e. the penalty,] shall be paid to, &c., [as before]*]; and that the said sum of — [*i. e. the value of the articles stolen, or the amount of the injury done*] shall be paid to *C. D.* [*the party aggrieved, unless he is unknown, or has been examined in proof of the offence. In which case state that fact, and dispose of the whole like the penalty, as before*]; and I order that the said sum of — for costs, shall be paid to —, [*the complainant*]. Given under my hand and seal, the day and year first above mentioned.

within three days after such conviction, and seven clear days at the least before such sessions; such person to remain in custody until the sessions, or *enter into a recognizance with two sureties*, to appear at the said sessions to try such appeal, and abide the judgment of the Court thereupon, and pay such costs as shall be awarded: and, on such notice being given, and recognizance entered into, the committing justice is to liberate such person if in custody; and the Court at such sessions shall hear and determine such appeal, and make such order as they shall think meet, and issue process for enforcing such judgment (*w*)

The 73d section enacts, that no conviction shall be quashed for want of form, or removed by *certiorari*; and no *warrant of commitment* held void by reason of any defect therein, provided it be therein alleged that the party has been *convicted*, and there be a valid conviction to support the same (*x*) Section 74 directs, that all convictions shall be returned to the Quarter Sessions, and how far they shall be evidence in future cases. (*y*) Section 75, for the protection of persons acting in the execution of this act enacts, that all actions and prosecutions against any person acting under that act shall be laid and tried in the county where the fact was committed, and commenced within six calendar months, and directs that *notice in writing* of such action, and of the cause thereof, shall be given one calendar month, at least, before the commencement thereof: and in such action, defendant may plead the general issue, and give the special matter in evidence; and no plaintiff shall recover in such action if tender of sufficient amends shall have been made before action brought, or if a sufficient sum of money be paid into Court after such action brought; and then regulates the payment of costs. (*z*)

The principal statute against *small malicious injuries* to any real or personal property, is 7 & 8 Geo. 4, c. 30. (*a*) The 24th section is very comprehensive, and enacts, “that if any persons shall “*wilfully or maliciously* commit *any damage, injury, or spoil*, “to or upon any real or personal property whatsoever, whether “of a *public or private nature*, for which no remedy or punish- *Thirdly, Pro-
ceedings for
small wilful
or malicious
injuries to per-
sonal or real
property, on
7 & 8 Geo. 4.
c. 30. s. 24.*

(*w*) Id. sect. 72.

(*x*) Id. sect. 73; see a similar enactment, and reason, *ante*, 134; and *Weeks v. Clutterbuck*, 2 Bing. 483.

(*y*) Id. sect. 74.

(*z*) Id. sect. 75.

(*a*) See the enactment, and others of the same nature, and decisions thereon, *ante*, Part I, page 136 to 137, 138, 9, as to Personalty; and id. page 407, as to Realty.

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

ment is hereinbefore provided; (b) every such person being convicted thereof, before *one Justice of the Peace*, shall forfeit and pay such sum of money as shall appear to the justice to be *reasonable compensation* for the damage, injury, or spoil, so committed, not exceeding the sum of five pounds; (c) which sum of money shall, in the case of *private property*, be paid to the party aggrieved, (except where such party shall have been examined in proof of the offence, (d) and in such case, or in the case of property of a public nature, or wherein any public right is concerned, the money shall be applied in such manner as every penalty imposed by a Justice of the Peace under that act, is thereafter directed to be applied. And if such sum of money, together with costs (if so ordered), shall not be paid, either immediately after the conviction, or within such period as the justice shall, at the time of the conviction appoint; the justice may *commit the offender* to the common gaol or house of correction, there to be imprisoned only, or imprisoned and kept to hard labour, as the justice shall think fit, for any term not exceeding two calendar months, unless such sum and costs be sooner paid. Provided always, that nothing herein contained shall extend to any case where the party trespassing acted under a *fair and reasonable supposition that he had a right to do the act complained of*, (e) nor to any trespass *not* being wilful or malicious, committed in *hunting, fishing, or in the pursuit of game*; but that every such trespass shall be punishable in the same manner as before the passing of this act." (f)

The 25th section enacts, that *malice* against the owner shall not be essential to be proved to establish an offence under that act. Section 28 enacts, that persons *found committing offences*

(b) We have considered this enactment and the decisions thereon, *ante*, 1 Vol. 407 to 410. There must have been some sensible real damage, and not a mere trespass in law; and therefore the mere fact of repeatedly trespassing, by walking over a party's land without breaking fences, &c. would not, it seems, be within this act; *Butler v. Turley*, 2 Car. & P. 585; *Dewey v. White*, Mood. & Mal. C. N. P. 56; and *Rex v. Turner*, R. & M. C. C. 259; and the injury must be charged, and proved as charged; and therefore a charge of maliciously *cutting* a fence, will not sustain a conviction of *carrying away* a fence previously severed by another person; *Rex v. Harnur*, 1 Dowl. and Ry.

223; and the magistrate must really assess the damages accruing according to the evidence; *id. ibid.*

(c) See conclusion of the last note.

(d) This provision, as observed, *ante*, 136, removes all pecuniary motive for perjury.

(e) This was to provide for *bona fide* claims of right; see *Kennerley v. Orpe*, Dougl. 517; but it must be some fair and plausible colour of title; *Hunt v. Andrews*, 3 Bar. & Ald. 341; *Calcraft v. Gibbs*, 5 T. R. 19; *Grant v. Hatton*, 1 Bar. & Ald. 134; 1 Burn's J., tit. Conviction, 26th ed. 832, 831.

(f) And see the Game Act, 1 & 2 W. 4, c. 32, *post*, 142.

under the act (g) may be apprehended without a warrant by any peace officer or owner of the property injured, or his servant, or person authorised by him. By sect. 29, prosecutions for offences punishable on summary conviction are to be commenced within three calendar months; and the party aggrieved may be a competent witness. Sect. 30 requires a charge upon the *oath* of a credible witness, and then authorizes the justice to summon the party charged to appear at a time and place to be named in such summons; and requires service of such summons in the same term as in the 7 & 8 Geo. 4, c. 29. s. 65, and authorizes a warrant also as therein mentioned. (h) Sect. 31 enacts, that abettors in offences punishable on summary conviction, shall be liable to the same forfeiture and punishment to which the principals are liable. The 32d sect. enacts, that any money forfeited for any injury shall be paid to the party aggrieved, excepting when he has been a witness: and then, or in case he be unknown, the same and every sum to be imposed as a penalty, is to be paid to the overseers of the poor, or other officer, as directed by the justice, and to the use of the general county rate. (i) The 33d section provides, that if the damage or penalty be not paid, the offender is to be imprisoned, with or without hard labor, for a term not exceeding two calendar months, where the sum and costs to be paid do not exceed 5*l.*, or four months if above that sum, and not more than 10*l.*, or not exceeding six months, in any other case determinable on payment. (k) Section 34 enables a justice, after a first conviction, to discharge the offender upon his making such satisfaction to the party aggrieved, for damages and costs, or either, as shall be ascertained by the justice. (l) And section 35 enables the King to pardon the party imprisoned. The 36th section enacts, that in case any person convicted of any offence, punishable upon summary conviction, shall have paid the sum adjudged, together with costs, or shall have received a remission thereof from the crown, or shall have suffered the imprisonment awarded for non-payment, or the imprisonment adjudged in the first instance, or shall have been discharged from his conviction in the manner aforesaid; in every such case he shall be released from all further or other proceedings for the same cause. (m) Section 37 prescribes the

(g) As to the import of those words; see 1 Vol. 617 to 630; and in particular *Hanway v. Boulthbee*, 2 Mood. & M. 15; 4 Car. & P. 350, S. C., and the observations of Tindal, C. J. *id*; and *ante*, 1 Vol. 625, 6.

(h) *Ante*, 137.
(i) *Id.* sect. 32.
(k) *Id.* sect. 33.
(l) *Id.* sect. 34.
(m) *Id.* sect. 36.

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

The prescribed
form of con-
viction in 7 &
8 Geo. 4. c. 30,
same in sub-
stance as *ante*
138, note (u).

form of conviction, and which is precisely the same as in the form prescribed in chap. 29, omitting the words in italics. (n) The 38th section provides, that in all cases where the sum adjudged to be paid shall exceed 5*l.*, or the imprisonment shall exceed one month, or the conviction shall take place before *one* justice only, any person who shall think himself aggrieved by such conviction, may appeal to the next Court of General or Quarter Sessions, provided he shall give to the complainant a notice in writing of such appeal, and of the matter thereof, within three days after such conviction, and seven clear days at the least, before such sessions; such person to remain in custody until the sessions, or enter into recognizances to appear and prosecute such appeal, and abide the judgment of the Court. (o) Section 39 enacts, that no conviction shall be quashed for want of form, or removed by *certiorari*, and no warrant of commitment held void by reason of any defect therein, provided it be therein alleged that the party had been convicted, and there was a valid conviction to support the same. (p) The 40th section directs that all convictions shall be returned to the Quarter Sessions, and how far they shall be evidence in future cases; (q) and sect. 41 contains the usual provision for the protection of persons acting *bonâ fide* under the provisions of the act. (r) It will be found that these several enactments in the 7 & 8 Geo. 4, c. 30, are in general the same as those in the 29th Chapter of the same session; and the prescribed form of conviction is the same, excepting that the words in italics are to be omitted when proceeding under chap. 30.

Fourthly, Pro-
ceedings on the
Game Act,
1 & 2 W. 4. c.
32, giving
summary pro-
ceedings for
trespasses in
pursuit of
game.

The statute 1 & 2 W. 4, c. 32, contains some strong summary measures for the preservation of Game and Rabbits; sect. 12 subjecting even the tenant or occupier to a penalty of 2*l.* if he pursue or give permission to others to pursue, kill, or take *game* upon land in his own occupation, when the right to the game is exclusively in his landlord or another person, and also to 1*l.* for every head of game killed by him, recoverable before two justices: and sect. 24 subjects all persons to a penalty of 5*l.* for every destroyed egg of any bird of game, or of swan, wild duck, teal, or widgeons, recoverable before two justices; and sect. 3 subjects any person to a penalty not exceeding 10*l.* for laying poison to destroy or injure game, recoverable before two jus-

(n) See *ante*, 138, note (v).

(o) *Id.* sect. 38.

(p) *Id.* sect. 39.

(q) *Id.* sect. 40.

(r) *Id.* sect. 41.

tices. And sect. 30 subjects all trespassers in the day time in pursuit of game, to a penalty of not exceeding 2*l.*, recoverable before one justice; and if five or more be assembled together in the day time for the same purpose, they shall forfeit 5*l.*, also recoverable before one justice: and other penalties are imposed by the same act. But the 35th sect. contains an exception in favor of persons hunting or coursing with hounds, or grey-hounds, and being in fresh pursuit of any deer, hare, or fox already started upon any other land, or to any person *bonâ fide* claiming free warren or free chace, and of game-keepers within their proper manors.

But this act directs all the penalties to be paid to the overseers of the poor, in aid of the county rate. It then prescribes the times for commencing the prosecution and for payment of penalties. The form of conviction—mode of compelling the attendance of witnesses—prescribes that personal service of a summons on the party accused, *or leaving the same at his usual place of abode to some inmate thereat, and explaining the purport thereof to such inmate*, shall suffice, or the magistrate may issue his warrant to apprehend, *in the first instance*, upon information upon oath that the party is likely to abscond. The act then gives an appeal, but takes away any removal by *certiorari*, or otherwise.

It will be observed, that the four enumerated acts introduce summary proceedings for punishment, and sometimes for satisfaction for very numerous small injuries which would not be the fit subjects of indictment; but, at the same time, they take from justices the investigation of a case, where a *bonâ fide* right is fairly in contest.

Constructions
and operation
of the four
recent acts.

Thus, the 9 Geo. 4, c. 31, gives jurisdiction to two justices in case of *common assaults or battery* of the person; but if they find the same to have been justifiable, or so trifling as not to merit any punishment, they are to dismiss the complaint; and if *they find* that the assault or battery was accompanied by any attempt to commit a felony, (which is indictable as a misdemeanor,) or shall be of *opinion* that the same is, from any other circumstance, a fit subject for prosecution by indictment, they shall abstain from any adjudication, and shall then deal with the case as if the act had not been passed; *i. e.* they shall bind the party over to appear at the sessions or assizes, there to defend an indictment. And justices are expressly prohibited from determining any case of assault or battery in which any question shall arise as to the title to any lands, tenements, or heredita-

Construction
of Common
Assault and
Battery Act,
9 G. 4, c. 31.

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

ments, or any interest therein, or accruing therefrom, or as to any bankruptcy or insolvency, or any execution under the process of any Court of Justice. (s) But as the justices are to *find*, or be of *opinion*, that the common exception is established, it seems, that although they proceed to convict in a case of assault, apparently with intent to commit a felony, the Court of King's Bench will not interfere on *certiorari* to quash the conviction, the justices not having, by their conviction, found the intent to commit a felony. (t)

Construction
of Petty Steal-
ing Act, 7
& 8 G. 4, c. 29.

The 7 & 8 Geo. 4, c. 29, we have seen, authorizes summary convictions for many small takings with intent to steal, in the nature of *larceny*, but which are *not indictable*; and authorises, on the oath of a credible witness, a *search warrant* for the stolen property; and enables the justice, in express terms, even after conviction, to discharge the offender upon his making such satisfaction to the party aggrieved for damages and costs, or either, as shall be fixed by the justice. So that a summary proceeding under this act, may be the means of obtaining satisfaction for the private injury, although the party aggrieved may himself have been a witness in support of the information.

But in order to sustain a conviction for taking away an article under this act, the information must have charged the offence in substance, within the terms of it; and on an information for maliciously damaging and taking away a post, intended to be framed on the 30th chapter, a conviction of taking away cannot be sustained (u) So with reference to the decision on the statute 5 Geo. 3, c. 14, for taking and destroying fish, the information and conviction must specify the number of fish taken. (u) The proceedings on the act 7 & 8 Geo. 4, c. 29, should also state the number.

Construction
of Malicious
Injury Act,
7 & 8 G. 4, c.
30.

The 7 & 8 Geo. 4, c. 30. s. 24, only applies to *wilful* or *malicious* injuries; but it is not necessary that the act should have been *malicious* to the owner, and the words are in the disjunctive, *wilful or malicious*; (w) but it must be charged and proved to have been either *wilful* or *malicious*. (x) This act only extends to *damage, injury*, or *spoil*, of real or personal property, public or private, and does not include a mere illegal *taking or stealing*; and therefore where upon a charge of *wilfully and maliciously cutting, spoiling, taking and carrying away*

(s) 9 Geo. 4, c. 31, s. 29.

(t) *Ante*, 133, note (q).

(u) *Rex v. Harpur*, 1 Dowl. & R. 222,
post.

(v) *Rex v. Marshall*, 2 Keb. 594;
and see *Queen v. Burnaby*, 2 Lord Raym.

900; 1 Salk. 181; but when not, see
Rex v. Rabbitts, 6 Dowl. & R. 311.

(w) *Ante*, 139, 140.

(x) *Rex v. Turner*, Russ. & M. C. C.
239.

a post out of a fence, the defendant was only committed for wilfully and maliciously *carrying the post away*, the Court held such commitment bad, and discharged the defendant (x) The act complained of must have occasioned an *actual* and *real* damage, and not a mere damage in law, as by walking over the complainant's field, whether in asserting a right of way or otherwise. (y) But the unnecessarily wounding and really injuring a small dog, barking at the party, was held an injury within the meaning of the act (z). Justices also, under this act, are not to award a sum as a penalty in punishment of the wrong doer, but only a *reasonable compensation* for the damage, injury or spoil, not exceeding 5*l.*; they must therefore, in each case, duly ascertain the real amount of the injury, and limit their adjudication accordingly. (a) The enacting clause, we have seen, contains a provision that the act shall not extend to any case where the party trespassing acted under a *fair and reasonable supposition*, that he had a right to do the act complained of; nor to any trespass *not* being wilful and malicious, committed in hunting, fishing, or in pursuit of game (provided for by the 2 & 3 W. 4, c. 32.); but that every such trespass shall be punishable in the same manner as before the passing of the act. But it has been held, that the cutting a shrub, upon pretence of its being likely to become injurious to an adjoining wall, is within the act, although the title to the spot on which the shrub grew was in dispute; the maliciously destroying a shrub or a tree of immature growth, being an irretrievable injury, and not an act that can be necessary in the fair assertion of a right; (b) and the proviso is also confined to *bona fide*, and not mere colorable claims of right, as a pretended excuse, known to the party to be unfounded. (c) The information and conviction in this act, when for damaging several articles, ought to specify the number at least; it was so held upon a summary proceeding, on the 43 Eliz. c. 7, s. 1, against cutting trees, and where it was held, that the information and conviction were defective for not mentioning the number of the trees cut, being the measure of the damages to be given for the injury; and yet the number stated need not be proved precisely according to the allegation. (d)

(x) *Rex v. Harpur*, 1 Dowl. & R. 222.(y) *Butler v. Turley*, 1 Mood. & M. 54; 2 Car. & P. 585; *Dewey v. White*, M. & M. Cas. N. P. 56; *ante*, 1 Vol. 409, 410.(z) *Hanaway v. Boulthbee*, 2 Mood. & M. 15; 4 Car. & P. 350, S. C.; *ante*, 1 Vol. 625, 6.

VOL. II.

(a) *Rex v. Harpur*, 1 Dowl. & R. 222.(b) *Rex v. Whately*, 2 Man. & Ry. Mag. Cas. 313.(c) *Ante*, 1 Vol. 408, note (d).(d) *The Queen v. Burnaby*, 2 Lord Raym. 900; and 1 Salk. 181; and see 2 Keb. 594; when not, see *Rex v. Rabbits*, 6 Dowl. & R. 341.

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

Construction of
Game Act, 1 &
2 W. 4, c. 32.

The *Game Act* was intended to prohibit the mere occupier of land, as a tenant, from sporting, under a lease for not exceeding twenty-one years, granted before the act, and upon which no fine had been taken, although the lease did not except or reserve the game, but merely contained a clause, that the lessor should be at *liberty to enter* to shoot, hunt, fish, and otherwise sport; (e) but a small majority of magistrates, at the Kent Sessions, recently held otherwise, and that the lessee, under such a lease, had a right to kill game after the act came into operation. (f) It is clear, however, under the 8th section of the act, that if a lease be executed after the passing the act (*viz.* 5th Oct., A. D. 1831), containing merely a right of entry for the lessor to kill or take game, although the game be not *reserved*, the lessee would have no right to sport. It has been holden, that as the 39th section gives a *general* form of conviction, (though it in terms requires a specification of time and place, where the offence was committed,) yet a conviction, alledging that the defendant on, &c., in the parish of, &c., did commit a trespass by entering in the day time of that day, *upon certain land* there, in the occupation of *A. B.*, in search and in pursuit of game, contrary to the statute in that case made and provided, whereby he forfeited a sum not exceeding two pounds, was sufficiently certain, although it was objected, that it should have averred that the trespass was in a close called, &c., because the name of the close and the nature of the land, are immaterial, and the occupier is not to have any part of the penalty, and any body may be the informer. (g)

Similarity in
the several
statutes of this
nature.

It will be observed, that many of the enactments to be found in the acts of 7 & 8 Geo. 4, c. 29, and c. 30, and in 9 Geo. 4, c. 31, and in several other statutes, are in the same words, or nearly so; and that when they contain enactments *in pari materia*, the decisions upon the clause in one act, will in general, or very frequently, equally apply to a similar clause in another act. But there are some important distinctions as regards the *number* of justices who must convict, or the charge being *on oath*, or the requisite of the summons being *personally served* in some cases, when not essential in others; and there are some other differences for which it is difficult to account, but which render it indispensably necessary in each case, to

(e) *Id.* sect. 7 & 12.

(f) East Kent September Sessions, A. D. 1833; *Lord Guildford v. Boys*.

(g) Per Taunton, J. in Bail Court, Leg. Observer, A. D. 1833, 6 Vol. 378;

R. v. Mellor. But, in general, the *particular* circumstances must be shewn with certainty in a conviction; *Ex parte Smyth*, 3 Dowl. & R. 461, and *post*.

observe great care in examining the statute, to ascertain what steps are essential.

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

The proceedings under these statutes, whether for *damages* or *penalties*, as well as for *all offences* punishable *summarily*, before one or more Justices of the Peace, in their natural order, may be arranged as in the analytical order at the commencement of this chapter, being the following heads.

SECONDLY,
PRACTICAL
PROCEEDINGS
TO ENFORCE
COMPENSA-
TIONS OR PE-
NALTIES.

With respect to the *time* within which a summary proceeding before a justice or justices must be commenced, it in general depends on the terms of the particular statute giving the penalty or remedy. We have seen that all the recent acts of a general nature require that "the prosecution be commenced within *three calendar months after the commission of the offence*." (h) If the particular act should omit to prescribe any time, then the 31 Eliz. c. 5, s. 5, would apply, and render it necessary to proceed within one year. Some acts, as the General Highway Act, 13 Geo. 3, c. 78, s. 75, prohibit the commencement of a summary proceeding until after the lapse of *some time*, and even require ten days' notice to the offender, of the intended prosecution for a penalty. The General Turnpike Act, 3 Geo. 4, c. 126, s. 143, even requires twenty-one days' notice to the offender. (i) In one instance, under the now repealed game laws, the statute even required that the *conviction* should be within three calendar months, and which was held imperative; and that although the final hearing and conviction stood over beyond the limited time at the request of the defendant himself, yet a subsequent conviction was invalid. (k) But in general the acts merely require that the prosecution be *commenced* within a named time, and in that case a conviction may take place at any subsequent time. (l)

First, within
what time an
information
must be exhi-
bited or com-
menced.

With respect to the term *month*, unless expressly declared otherwise, it is, in statutes relative to summary proceedings, and convictions, and in Courts of law and equity, generally construed to be *lunar*; (m) though when the question relates to

Month, how
construed.

(h) 9 Geo. 4, c. 31, s. 34, *ante*, 132; 7 & 8 Geo. 4, c. 29, s. 64, *ante*, 135, *id.* chap. 30, s. 29, *ante*, 136; Game Act, 1 & 2 W. 4, c. 32, s. 41; *ante*, 142.

(i) *Towsey v. White*, 5 B. & Cres. 125; 7 D. & R. 810; and see *Freeman v. Line*, 2 Chitty's Rep. 673, as to the requisite form of notice to a Toll-gate col-

lector.

(k) *Rex v. Tolley*, 3 East, 467; *Rex v. Bellamy*, 1 B. & Cres. 500; 2 Dowl. & R. 727, S. C.

(l) *Rex v. Barrett*, 1 Salk. 383.

(m) 3 Burr. 1455; *Rex v. Bellamy*, 1 B. & Cres. 500; 2 Dowl. 7 & R. 727, S. C. So in equity, 2 Sim. & Stu. 476.

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

When the first
day, to be ex-
cluded.

ecclesiastical affairs, (*n*) or commercial or nautical subjects, it is generally otherwise. (*o*)

The decisions are contradictory whether the *day* of committing the offence is to be construed *inclusively* or *exclusively*, and therefore no risk should be incurred in that respect by unnecessary delay. The rule formerly laid down was, that when a statute directs that the prosecution shall be commenced within a specified number of days or months, "*from the committing of the offence*," then the day on which it was committed should be *included* in the calculation; but that when the act prescribed the limitation *from the day* of doing the act, then the whole of that day should be excluded; (*p*) and certainly till of late that doctrine prevailed, and it was held that the limitation of the time of commencing an action against a justice, was to be *inclusive* of the day of his doing the act complained of. (*q*) It will be observed that by this rule of construction, the party had in truth less time allowed him than the legislature apparently intended; for if the offence were committed near the last instant of a day, then by including in the calculation that day, he had nearly one entire day less than the three months or other limited time, within which he must have commenced his proceeding. The propriety of this rule having been considered, and denied by the Master of the Rolls; (*r*) the subject was recently brought under the consideration of the Court of King's Bench in two cases, which establish that the first day ought to be *excluded*, at least in cases where the party injured may not immediately know of the injury to his property; as in proceeding against the hundred for a demolition by fire, when the act requires that the owner of the demolished building, or his servant, shall, "*within seven days after the commission of the offence*," go before a justice and submit to examination respecting it; and it was held that such seven days are to be calculated *exclusive* of the day on which the damage was committed; (*s*) and it was also held, that if a person be released from his illegal imprisonment on the 14th December, it suffices to commence his action against the magistrate who illegally imprisoned him,

(*n*) In case of non-residence, the month is construed to be *calendar*; 2 Rol. Ab. 521; Com. Dig. tit. Ann. B.; Hob. 179; 1 Bla. R. 150; 1 Bing. 307; 1 M. & S. 111.

(*o*) 1 Stra. 652; 1 Maule & Sel. 111; 6 Maule & Sel. 227; 3 Brod. & B. 187; 1 Esp. Rep. 186.

(*p*) Per Parker, C. J., in *Rex v. Green*,

10 Mod. 112; *Rex v. Adderly*, Dougl. 465; *Rex v. Bass*, 5 T. R. 251; Paley on Convictions, by Dowling, 1 Vol. 16.

(*q*) *Clark v. Davey*, 4 Moore, 465; but *semble* overruled by *Hardy v. Ryle*, 9 B. & Cres. 603.

(*r*) 17 Ves. 248.

(*s*) *Pellew v. Inhabitants of Worsford*, 9 B. & Cres. 134.

on the 14th June following, because the whole of the last day of imprisonment is to be *excluded* in the calculation. (t) These recent decisions appear sufficiently to establish, that in general, as regards summary proceedings for offences or injuries of a private nature, the rule will now be to *exclude* the *first day*. But this is not yet quite established as a universal rule, for in the latest case upon the calculation of time under the Bankrupt Acts, it has been decided that if a seizure be made under a *fieri facias*, it will not be defeated unless a commission or fiat in bankruptcy be issued within two months after, and that the day of the seizure, in that case, is to be *excluded* in the calculation of time. (u) It seems difficult to reconcile these contradictory decisions. (v)

It has been supposed that if two informations for the same offence should be exhibited on the same day, they would mutually abate each other. (w) But that doctrine was entertained at a time when it was a maxim that there could not be any fraction of a day, which is now abandoned, when the precise hour when a fact took place is capable of being ascertained; and now undoubtedly the validity of the information first exhibited would not be affected by a subsequent information on the same day.

Although the recent three general acts relative to *private* injuries to the person or to personal or real property describe the injury as an *offence*, yet in some instances only the *party injured* can be the complainant. (x) The 9 Geo. 4, c. 31, s. 27, is express, that the complaint for a *common* assault or battery shall be by the *party aggrieved*, and consequently no other person can carry on a proceeding under that act; and when the party injured has prosecuted summarily, he cannot also sue at common law. (y) And although the 7 & 8 Geo. 4, c. 29, s. 75, and *id.* c. 30, s. 36, are not so express in this respect, and merely require that the summons shall be issued on the oath of a *credible witness*, (y) yet in case of injuries to *private* property, and

Secondly, who
to prosecute.

(t) *Hardy v. Ryle*, 9 B. & Cres. 603; 4 Man. & Ry. 300; and see Com. Dig. Temps, A.; 2 Campb. 254; 5 T. R. 283; 3 B. & Ald. 581.

(u) *Godson v. Sanctuary*, 4 B. & Adolp. 255; 1 Nev. & Man. 52, S. C.; and see 3 Young & Jerv. 15, 16.

(v) See the cases as to time in general, Chitty's Col. Stat. tit. Time, and Com. Dig. tit. Temps. N. B. As far as regards the *practice* of the Courts, the 8th Rule, Hil. T. 1832, establishes that the first day should be excluded.

(w) *Hawkins*, P. C., Book 2, chap. 26, sect. 63.

(x) This is generally so when the whole penalty is given to a party aggrieved; *Rex v. Daman*, 2 B. & Ald. 378; 1 Chit. R. 147; and see *Rex v. Harpur*, 1 Dowl. & Ry. 222; 1 Mag. Cases, 67, decided on the now repealed Malicious Trespass Act, 1 Geo. 4, c. 56; or it must appear that the proceeding is with his concurrence, *id.* *ibid.*

(y) 9 Geo. 4, c. 31, s. 27; 7 and 8 Geo. 4, c. 29, s. 70, *id.* chap. 30, s. 36.

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

when the damages are given in the first instance to the owner, it should seem that the information must be in the name, or at least at the instance of or with the concurrence of the party aggrieved, to whom the damages are to be paid (unless he give evidence), and whose private remedy by action is to be barred by a conviction on the summary proceeding, and payment, imprisonment, or remission by the Crown; a provision which would not have been enacted if any common informer could have prosecuted. (z) But where a wilful or malicious injury has been committed to *public* property, as to a bridge, church, &c., then perhaps *any* person may be the prosecutor. (a)

With respect to the *Game Act*, 1 & 2 W. 4, c. 32, whether the proceeding is against the occupier, under the 12th section, or against any other trespasser, under the 30th section, or for any other of the several penalties imposed by that act, (all which are to be paid to the overseer or officer in aid of the general county rate, and the informer is not entitled to any proportion under the 37th section,) *any* person may be the informer. The *Game Act*, however, in section 46, provides that the party injured may sue for the trespass at common law, unless he has instituted the prosecution for the penalty.

As the statutes 7 and 8 Geo. 4, c. 29, s. 65, and c. 30, s. 30, require the oath of a *credible* witness as to the committing of the offence, before the justice can issue his summons; it should seem that the complainant or informer, or at least some person in support of the complaint, must be a *credible* witness, and not a party who has been convicted of any offence which would render him incompetent. The game act, 1 & 2 W. 4, c. 32, s. 41, also requires the oath of a *credible* witness, before the justice can summon the supposed offender.

As the 9 Geo. 4, c. 31, s. 27, merely requires the complaint of the party aggrieved, without requiring that such *complaint* shall be on oath, any party aggrieved, however objectionable in point of credit, might make the charge under that act, although before he could obtain a summons, there must, under section 33, be the deposition of the offence by a *credible* witness. It has been held, that when an act gives a penalty to *any* informer, then any person whatever may lay the information; although when interested in the penalty, he would not afterwards be a competent witness upon the *hearing*. (b) But that where the

(z) See in general *Rex v. Daman*, 2 B. & Ald. 378; 1 Chit. R. 147; and see 7 and 8 Geo. 4, c. 29, s. 70; and id. c. 30, s. 36; see also *Rex v. Harpur*, 1 Dowl. & R. 222; 1 Mag. Cas. 67. S. P.

decided on the prior *Malicious Trespass Act*, 1 Geo. 4, c. 56.

(a) 7 and 8 Geo. 4, c. 30, s. 24.

(b) 2 Lord Raym. 1546.

statute gives the penalty, or a part, to a party *aggrieved*, or requires in express terms that the complaint shall be by him, then it must appear either that he made the complaint or exhibited the information, or at least that it was *at his instance*. (c)

CHAR. IV.
SUMMARY PRO-
CEEDINGS, &c.

In cases where any person may be the informer, it will be obvious that no person who could give material evidence should be placed in that situation which would exclude his testimony, but the information should be in the name of another person, and the witness's testimony reserved until the hearing. (d) The law as to who may be an informer, under the late excise and custom regulations, and indeed all the proceedings in those cases, will be found collected in Burn's Justice, title Excise and Customs. (e) Sometimes it becomes a question of difficulty who is to be deemed the informer, as where rewards are to be paid to the first informer; and in the Exchequer it has been held that the person who informs the *Court*, that is, the person in whose name an information has been filed, is to be considered the informer. (f)

Particular statutes (as the General Highway Act, 13 Geo 3, c. 78, s. 6,) authorize a justice to convict upon *his own view*; but if a driver of a cart refuse to inform him the name of the owner, this does not justify the magistrate in stopping the cart and horses in order to examine the board, although the driver wilfully placed himself before the board on which his master's name was painted; and it was holden that the magistrate was liable to an action of trespass. (g) The justice's view must also expressly be stated. (h)

Summary pro-
ceedings on
justice's own
view.

In general, the proceeding can be only against a party actually present and committing the offence; but a *principal* who instigates the prohibited injury, although absent, may be proceeded against for the act of his agent or servant; and *masters* (i) as well as *partners* (k) are frequently *liable* to penalties for the

Thirdly,
Against whom.

(c) *Rex v. Daman*, 2 B. & Ald. 378; 1 Chit. R. 147, S. C.; with the full notes; and see *Rex v. Harpur*, 1 Dowl. & Ry. 222; 1 Mag. Cases, 67, S. C.

(d) *Rex v. Stone*, 2 Lord Raym. 1545; *R. v. Tilley*, 1 Stra. 316; *R. v. Piercy*, Andr. 18.

(e) 26th edit.

(f) *Sanders v. Bevan*, 7 Feb. 1786, MS. In cases of rewards for intelligence, the party *who communicates* that information to the party interested, is entitled, and not the mere private narrator; 1 Maule & Selw. 108; as to a *division of a reward between several*, 3

Wentw. 30.

(g) *Jones v. Owen*, 2 Dowl. & Ry. 600.

(h) *Rex v. Justices of Kent*, 10 B. & Cres. 477.

(i) *Mitchell v. Toruss*, Parker, R. 227; *Rex v. Dixon*, 3 M. & S. 7; and see liability of principal for acts of agents and servants in general, *ante*, 1 Vol. 78, 79; *Attorney General v. Siddon and Binns*, 1 Tyr. Rep. 41.

(k) As to Partners, Bunb. 223; Comyn. Rep. 616; 5 Burr. 2686; 5 T. R. 649.

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

acts of their servants or partners in the course of their employ or joint trade, although absent and not actually authorizing the commission of the offence. *Married women* (l) and *infants* (m) are in general liable for trespasses and torts unconnected with contract, and may be prosecuted for penalties under these acts. But it has lately been considered that as infants cannot *contract*, therefore an infant could not be legally punished by magistrates under the 4 Geo. 4, c. 34, as a *servant* neglecting to fulfil his contract. (n)

As respects the *number of offenders*, when several are jointly guilty, they may be proceeded against accordingly, and they incur only one or several penalties according to the terms of each particular enactment. (o)

The 9 Geo. 4, c. 31, s. 27, is silent as to any difference in the penalty of 5*l.* when several are concerned in a common assault and battery, and therefore only one penalty could be adjudged for a joint injury. But the 7 & 8 Geo. 4, c. 29, s. 66, as to petty takings of property not indictable, supposes that several persons may have jointly committed the injury, and subjects each to a separate forfeiture to the extent of 5*l.*, though the party aggrieved is not to receive more than 5*l.*, and the other forfeitures to be paid to the use of the county rate; and the 7 & 8 Geo. 4, c. 30, s. 32, relating to malicious injuries, contains a similar provision.

The *Game Act* is silent as to the *number* of offenders, excepting in the 32d section of the act (1 & 2 W. 4, c. 32), when if the number of trespassers in the day-time exceed four, and any one be armed with a gun and is guilty of violence, intimidation, or menace, as specified in the act, *each* of them incurs a penalty of not exceeding 5*l.* recoverable with costs on conviction before two justices.

Fourthly, Before what justice or justices.

As justices of the peace have in general jurisdiction only over offences committed within their own county, and offences are also generally local, every information upon which to obtain a conviction should be laid before a justice or justices of the county in which the cause of complaint arose, and who is to

(l) *Rex v. Croft*, 2 Stra. 1120.

(m) 2 Bos. & Pul. 93; id. 530; 8 T. R. 545; Hawk. B. 1, c. 1, s. 10; 4 Bla. C. 308.

(n) Upon the authority of 1 Hawk. P. C. c. 64, s. 35, by Justices of the Borough of Newcastle, A. D. 1833; *sed quære*, for a married woman cannot in

general make a *contract*; but nevertheless she may be separately convicted of *selling gin*; *Rex v. Crofts*, 2 Stra. 1120.

(o) When only *one* penalty; 4 T. R. 809; 2 T. R. 712; 2 East, 573; when *several*, 2 East, 573; under the Toleration Act, *several*; 1 New R. 245; *Rex v. Clarke*, Cowp. 612; 5 T. R. 542.

receive the information and issue the summons or warrant. (*p*) The numerous enactments so vary in their provisions, whether the offence is determinable by *one* or two justices, that in each case it is necessary to examine the particular enactment creating the offence or authorizing the summary proceeding. Thus we have seen that a complaint for a common assault or battery must be determined by *two* justices, (*q*) whilst petty takings or small malicious injuries may in general be determined by one justice. (*r*) The convictions for second offences are in general more severely punished by *two* justices. (*s*) Under the Game Act, *one* justice in general has jurisdiction. (*t*)

When a statute requires a conviction or other *judicial* act by *two* justices, then a conviction by *one* would be void, and the two must meet and jointly together hear all the evidence, and consult together and be present when they actually conclude and determine upon their conviction, (*u*) though it is said to be immaterial as to the time when the magistrate puts his subscription and seal, provided he concurred in the conviction so as to make it the result of his judgment after hearing the evidence; (*v*) but as the signing and sealing constitute the legal evidence of the consummation of the resolution to convict, (*w*) and something might occur to alter the decision if both the justices were present at the signature, it may be at least questionable whether both must not then be present.

In *ministerial* acts to be done by *two* justices, it is true that it has been held to suffice, although the signatures and actual concurrence of each take place when they are separate; but the circumstance of an act being *judicial*, that is, the act of mental consideration and decision after discussion, makes the legal difference. (*x*) As far, however, as respects even the *judicial* act of two justices approving of the binding of an apprentice, it has been held to be sufficient although one magistrate sign the indenture when he be alone, provided he be afterwards present when the other executed it, and they both then agreed to the propriety of the measure. (*y*)

However, in all cases, whether *one* justice has or not ab-

(*p*) 21 Jac. 1, c. 4, s. 1; and see *Kite v. Lane*, 1 B. & Cres. 101.

(*q*) 9 Geo. 4, c. 31, s. 27.

(*r*) 7 and 8 Geo. 4, c. 29, s. 65; and *id.* c. 30, s. 24.

(*s*) 7 and 8 Geo. 4, c. 29, s. 31; *id.* s. 39, 40, 43.

(*t*) 1 and 2 W. 4, c. 32, s. 41.

(*u*) *R. v. Redware*, 3 T. R. 380; *Battye v. Gresley*, 8 East, 319; *R. v.*

Cole St. Aldwins, Burr. Sett. C. 136; *R. v. Forrest*, 3 Term R. 38; 2 East, 244.

(*v*) *R. v. Picton*, 2 East, 198; *R. v. Barber*, 1 East, 185.

(*w*) *Sharrington v. Strotten*, Plowd. 308.

(*x*) *Supra*, note, Dalt. Ch. 6.

(*y*) *R. v. Winwick*, 8 T. R. 454; *R. v. Stotfold*, 4 T. R. 596.

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

solute power alone to convict, it is always competent, and in general advisable, for *two* or more to concur, (z) as it better avoids mistakes, either in jurisdiction or decision on the merits, and is calculated to prevent any suspicion of partiality or other injustice. Another advantage may result from proceeding before *two* justices, viz. that of avoiding an appeal in some cases; for when a conviction has been before *two* justices, under the 7 & 8 Geo. 4, c. 29, and also c. 30, no appeal is given, although if the conviction had been by only *one* justice, the party might have appealed; and therefore it is obviously advisable, in cases under those acts, to obtain the conviction of *two* justices.

In general an information may be before *one* justice; and his summons, though to appear before *two*, suffices.

By express enactment, however, it suffices in general to lay an information before, and obtain the summons or warrant from, *one* justice, although *two* or more justices may, by a particular act, be required to determine and convict; for as the receiving the information and summoning the party are mere ministerial offices not requiring much judgment, they may be safely delegated to one justice, although it may be proper that the final decision should be by *two*. (a)

Justices not to be interested.

It is a general rule, that no justice should act in any case in which he is interested, (b) or where he may be supposed to be prejudiced; and in some instances this is particularly prohibited, as by the 1 & 2 W. 4, c. 37, prohibiting the payment, in certain trades, of workmen's wages in goods or otherwise than in coin, and which enacts that no justice, being a person also engaged in any of the trades or occupations enumerated in the act, or even the father, son, or brother of any such person, shall act as a justice under that act.

If a magistrate were wilfully and corruptly to convict in a matter in which he is interested, and decide in his own favour, a criminal information would probably be granted against him, or he might be indicted; (c) and where two justices agreed reciprocally to convict upon each other's informations under the former Game Act, it was decided that they were indictable for their conspiracy. So, where a magistrate, upon whose property a malicious trespass had been committed, issued a sum-

(s) Dalton's Justice, chap. 6.

(a) 3 Geo. 4, c. 23, s. 2.

(b) *Ante*, 83, 4; 3 Bla. Com. 299; and per Lord Stowell, in case of *Two Friends*, 1 Rob. Rep. 282; and see the observations in Dalton, J. chap. 173; 1 Inst. 377; Burn J. Justice, IV. 3 Vol. 26th edit. 472, 3; *R. v. Gudderidge*,

5 B. & Cres. 459; 8 Dowl. & Ry. 217; and 4 Dowl. & Ry. Mag. Cases, 35, S. C.

(c) *Case of the Mayor of Hereford*, who was imprisoned for such an offence; 1 Salk. 396; and *R. v. Otway*, 2 Burr. 653; *R. v. Hann and another*, 3 Burr. 1716.

mons requiring the offender to appear before himself, or some other magistrate, and purporting that information had been given to him the magistrate on oath, whereas no oath had been taken, and the information had been communicated by the magistrate to the informer, the Court, in discharging a rule for a criminal information against the magistrate, refused to give him his costs. (d)

In general, a county justice has jurisdiction over offences committed throughout the county; but it must not only appear that he is a justice of the county, but also that the proceeding is within its limits. (e) If the jurisdiction be given to a justice *in or near* a parish or place, or acting for the division, this is only directory, and any justice of the county may act; but if the authority is only to the *next* justice, then he only can act. (f)

It will be obvious that on every principle of justice, in order that the defendant may be apprised of the supposed offence he is to answer, and the magistrate what facts he is to try and adjudicate, and that the conviction or acquittal may be adducible in evidence, to prevent a subsequent proceeding for the same cause, there ought to be a *formal charge*, and which is sometimes termed a *complaint*, but more generally, at least as respects proceedings for a penalty, an *information*; (g) for, although there are some cases in which no charge in *writing* may in strictness be required, yet a charge or accusation must *in fact have been instituted*, and the justice before whom it has been made, should take down in writing the substance, in order afterwards duly to frame his summons or warrant, or limit the inquiry. (h) The only cases in which a previous information or charge is dispensed with, are those where a *justice* is authorized to convict on his *own view*. (i)

Fifthly, Of the information or complaint.

Although in practice under the enumerated recent acts, giving summary proceedings for private injuries, the party aggrieved may go before a *single magistrate* and *verbally* state his complaint, and which is then incorporated in a printed form; yet, when time will allow, and especially in cases of the least difficulty, it is advisable previously, deliberately and carefully, to

The form and strictness required in general.

(d) *R. v. Whateley*, 2 Man. & Ry. Mag. Cases. 313.

(e) *R. v. Dobbyn*, 2 Salk. 473; but see *R. v. Chipps*, 1 Stra. 711.

(f) *Sanders' case*, 1 Saund. 263, and notes, 2 Keb. 559; *R. v. Price*, Cald. 305; and see in general Burn J. tit. Justices of Peace.

(g) Lord Raym. 500; *Brookshaw v. Hopkins*, Loft, 240; and see Mr. Serjt. Williams' observations on *Sanders' case*, 1 Saund. Rep. 262, note 1.

(h) *R. v. Fuller*, 1 Lord. Raym. 510; *Brookshaw v. Hopkins*, Loft, 240.

(i) *Jones v. Owen*, 2 Dowl. & Ry. 690.

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

frame a *written information*, and then to take the same to the magistrate, who is not bound to prepare it, nor is responsible to the informer for its accuracy, but is merely to *receive* the information, unless indeed in cases where an oath of the offence is required, when it is incumbent on the justice before he issues any summons or warrant, to ascertain that a complete offence has been sworn to. The frequency of summary prosecutions failing, either in the first instance or after *conviction*, which has been quashed, is attributable to the defect in the information, and therefore more care is essential in framing the same than is usually observed. Before we consider the parts and requisites, it is a good general rule that an information should be framed with as much care as an indictment or declaration, and the rules of pleading affecting them, should be cautiously consulted and adhered to.

The usual form
of information.

The *usual form* of information in the books, (*k*) rather resembles a record or memorandum of an information having been *previously* exhibited than the information itself, which should be in the form subscribed, (*l*) especially if it be in the least apprehended that the justice will improperly refuse to receive or act upon that produced to him, or upon the verbal statement upon oath of the applicant and his witnesses.

The *substance* of the particular complaint must necessarily vary in each case. As the object of the information is to limit the informer to a *certain charge*, in order that the defendant may know what he has to defend, and the justice limit the evidence and his subsequent adjudication to the allegations in the information; it will be obvious, that in general it ought to be in substance as certain and technical as an indictment or declaration; and although it has been observed, that these summary proceedings ought not to be entangled in *greater* forms or ceremonies than the superior Court, yet on the other

(*k*) See Burn's Justice, tit. Convictions.

(*l*) See a short form, Burn, J. 26th edit. tit. Assault. The following form may in general be adopted.

A general
form of in-
formation on
the recent acts,
or on any penal
statute.

Middlesex.—The information and complaint of *A. B.*, of the parish of —, in the county of —, yeoman, made and exhibited before *E. F.*, Esq. one of His Majesty's Justices of the Peace of and for the said county of —, on the — day of —, in the year of our Lord 1833, at —, in the said county, upon his oath, duly administered to him, and who upon his oath saith :

That on, &c. at, &c. *C. D.*, of, &c. did, &c. [*here state the offence, and if contrary to a statute which created it, conclude*] contrary to the statute in that case made and provided; whereby the said *C. D.* forfeited for his said offence the sum of 5*l.*; and thereupon the said *A. B.* prayeth that the said *C. D.* may be summoned to answer the premises before one [*or two*] of His Majesty's Justices of the Peace in and for the said county.

Sworn before me, *E. F.* *A. B.*

See *several forms* on the recent acts, at the end of this head of Informations.

hand, proper form must not be set at nought; (m) and the mistatement or omission of any material averment in the *information*, is not cured by any statement in the *conviction* of *sufficient evidence* to constitute the offence, because the defendant can only be convicted of the charge *as laid* in the *information*, and *that* must be sufficient to support the conviction, and the evidence could only *prove*, and not supply, the defects in the information. (n) And it is a rule with respect to summary proceedings before justices on penal statutes, that after a conviction, nothing can be intended, so as to get rid of any defect in point of form; for every thing necessary to support the conviction must appear *on the face* of the proceedings, and must be established by regular proof, or by the admission of the party of that which is proved. (o) So where the information and conviction omitted to negative *the exceptions* in the enacting clause, Lord Kenyon observed, that the proceedings could not be sustained, and that the objection was not of *form*, but of *substance*; because, as Serjt. Hawkins remarks, the defendant could not plead to such an information or conviction, and could have no remedy against it, but from an exception to some defect appearing on the *face* of it, and all the proceedings are in a summary manner, and therefore the conviction itself should show that the party accused had not any defence, which the act in its exceptions gives to him if true; and there is much good sense in what was said by Hawkins, (p) for being a summary proceeding and conclusive on the defendant, it ought to have the greatest certainty on the *face* of it. (q) Many defects in pleading in the *Superior Courts* are aided at common law after verdict, upon the presumption that the superior Judges knowing the law, would not have allowed the jury to find their verdict as they did, if the requisite facts to constitute the offence or cause of action had not been proved. (r) But in case of magistrates, no such presumption in favour of their general knowledge of every part of law can be safely acted upon; and therefore there is not to be the same intendment in favour of the correctness of their proceedings.

And, although it may have been enacted in a particular

(m) Per Lord Kenyon, in *R. v. Swallow*, 8 T. R. 286; and see the observations of Abbott, C. J. in *R. v. Paine*, 5 Bar. & Cres. 251; 7 Dowl. & R. who said "words and matters of form must be observed in informations and convictions, as in indictments."

(n) *R. v. Wheatmims*, Dougl. 232.

(o) Per Holroyd, J. in *R. v. Doman*,

1 Chit. R. 155; but see 3 Geo. 4, c. 23, *post*, 158.

(p) 2 Hawk. c. 25, s. 113.

(q) Per Kenyon, C. J. in *The King v. Jukes*, 8 T. R. 544.

(r) 1 Saund. 228, note 1; *Humphreys v. Pratt*, in Lords, 2 Dow. & Clark, 288; 1 Brod. & B. 224; 1 M. & S. 237; Tidd, 9th edit. 919.

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

What defects
in information
aided, and
when.

statute (as indeed it has been by the general act, 3 Geo. 4, c. 23, s. 3), that when a *defendant has appeared and pleaded, and the merits have been tried*, no conviction shall be set aside *for want of form*, or through the mistake of any fact, circumstance, or any other matter, provided the *material* fact alledged were proved; still if the information and conviction omit to negative any defence under an excepting proviso, that is a defect in *substance*, and not aided as matter of *form*; (s) and there is no statute which aids proceedings before justices out of sessions *before* conviction. The 7 Geo. 4, c. 64, s. 20, as to indictments, does not extend or apply to informations before such justices; (t) and the general act 3 Geo. 4, c. 23, s. 3, regarding defects in form after conviction, still leaves the defendant on the hearing before the justice, at liberty to object to and defeat the information, in respect to many defects in form.

Information
may be sus-
tained in part,
though bad as
to the residue.

But an information for two distinct offences, or for a charge capable of being severed, although bad in part, or only proved in part, may be sustained as to the residue, if the objectionable part be so far abandoned that there is not an entire and indivisible conviction upon the insufficient as well as the valid part: so surplusage, that may be rejected will not prejudice in an information, any more than it would in an indictment or declaration. (u)

Surplusage,
when it will
not preju-
dice (u).

Substance of
the usual form.

In practice it will be observed, that the information usually states the name and addition of the informer or complainant, and that on such a day, at a named place in the county of which the magistrate is a justice, he cometh before a named justice of the peace in and for the said county, and on his oath states, that, &c. (shewing the time and place of committing the particular offence; and when it was not an offence at common law, concluding) contrary to the statute in that case made and provided, whereby he forfeited and became liable to pay a named penalty or damages, &c. (as in the particular act), to be distributed or paid according to law; and then praying that proceedings thereupon may be duly had: and which information is usually signed by the informer, and he is to be sworn to the truth of the statement when the statutes require his oath.

When informa-
tion must be in
writing.

Unless expressly or impliedly required, it is not necessary

(s) *The King v. Jukes*, 8 T. R. 542.
(t) *Davies v. Bint*, 3 B. & Cres. 586.
(u) As to the effect of surplusage in indictments, see 1 Chitty's Crim. L.

294 to 296; and as to surplusage in *Civil Pleadings*, see 1 Chitty on Pleadings, 5th edit. 262 to 266, 426 to 428.

that the information should be *in writing*. But when so required, it is imperative. (v) In practice it is usual to have it in writing, so as to enable the magistrate correctly to frame his summons thereon, and to limit the subsequent evidence.

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

If the particular statute do not require the information to be *on oath*, then that form is unnecessary; (w) though the addition of that form will not prejudice. (x) But when *an oath* is required, then the magistrate cannot legally act unless such oath has been made; (y) and if a magistrate should grant his warrant to apprehend without oath of a felony committed, when required by law, trespass lies against him; (z) and where a magistrate illegally issued a summons in a case in which he was interested, falsely reciting that an information *on oath* had been made, although the Court discharged the motion against him for a criminal information, they refused him the costs of shewing cause, on account of such irregularity. (a) The statute 9 G. 4. c. 31. s. 33, and the 7 & 8 Geo. 4. c. 29. s. 65, and *id.* c. 30. s. 30, relating to summary convictions for common assaults and batteries, and for small takings not indictable, and for malicious injuries not indictable, require the *oath of a credible witness*, before the magistrate can be called upon to issue even a summons. (b) When swearing is necessary, it is said to be requisite that upon the face of the information itself it should appear to have been *on oath*; but as the swearing must naturally be after the information has been exhibited to the justice, it should seem only to be necessary to state the swearing in the *subsequent* proceedings.

When informa-
tion must be
oath.

There is not perhaps any objection to an *information ready prepared* being presented to the justice, for him to swear the informer as to the truth, and it is not essential that it should be framed in the presence of the justice; at least it was so held as respected a ready prepared examination under the Hundred Act. (c) But as persons will sometimes incautiously and improperly, without due consideration of the facts, swear in the *very* terms of the act authorizing the summary proceeding, the proper course is for the justice, in all cases where the act re-

Information
may be
brought to the
justice ready
prepared.

(v) *R. v. Wilks*, Bose. 16; *Basten v. Carew*, 3 B. & Cres. 649.

(w) *R. v. Willis*, Bose. 16; *Basten v. Carew*, 3 B. & Cres. 649; 5 Dowl. & R. 558.

(x) *Sanders' case*, 1 Saund. 262, note 1.

(y) *R. v. Kiddy*, 4 D. & R. 734.

(z) *Morcom v. Hughes*, 2 Term. R.

(a) *R. v. Whateley*, 2 Man. & Ryl. Mag. Cases. 313.

(b) And see *R. v. Whateley*, 2 Man. & Ryl. Mag. Cases, 313, as to malicious injuries.

(c) *Semble*, *Lowe v. Broxtowe*, 3 Bar. & Adolph. 550.

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

quires the oath of a credible witness before issuing even a summons, to examine the witness as to the exact facts *after* he has been sworn; for we shall find, that at least upon the *hearing* of an information, the depositions ought to be taken in the *genuine language* of the *witness himself*, and not in compliance with the terms of the statute, (*d*), and that it is incorrect to prepare the *examinations* in the *absence* of the defendant, or *before* the witnesses have been sworn, or otherwise than before the justice, in the presence and hearing of the defendant, and when he may hear the questions as well as answers, and might at least suggest some further interrogatory. (*e*)

The complainant, either alone or with his witness, should, without being influenced by passion, resentment, or revenge, state to the justice the facts, precisely as they occurred, and without urging, or even soliciting, a warrant, against the justice's impression, leaving the justice to act as he may think fit; and then if *he* should mistake the law, or wilfully issue a warrant to apprehend the party accused, in a case when he ought not to have done so, then the informer and witness will be wholly free from liability, (*f*) unless indeed the party imprisoned can afterwards shew that the informer maliciously *pressed* the justice to issue his warrant. (*g*)

Name and
description of
the complain-
ant or in-
former.

The information must be in the name of the *proper complainant*, either the party aggrieved, or a common informer, when the latter is allowed to proceed; in the former case, to shew that the information is by the proper party, and in the latter, to prevent the shifting of an informer, and to preclude the alleged complainant, when interested, from giving evidence, (*h*) and in all cases in order that the defendant may know who is his accuser. (*i*) The 9 G. 4. c. 31. s. 27, requires the *complaint* to be by the *party aggrieved* himself, though s. 33 authorizes a summons upon the oath of *any* credible witness. The 7 & 8 G. 4. c. 29. s. 65 & 66, and the 7 & 8 G. 4. c. 30. s. 24 & 30, relating as well to public as private injuries, supposes, even in cases of injuries to private property, that the party aggrieved may not be known, or that the property maliciously injured may be public; and therefore seem, in some

(*d*) *Cohen v. Morgan*, 6 Dowl. & Ry. 8; *In re Rix*, 2 Dowl. & Ry. Mag. Cas. 251; *Mills v. Collett*, 2 Man. & Ry. Mag. Cas. 262; *Rex v. Marsh*, 2 B. & Cres. 717; 4 Dowl. & R. 260; 2 Mag. Cas. 182.

(*e*) *Rex v. Kildy*, 4 Dowl. & Ry. 734; *Rex v. Swallow*, 8 R. T. 284.

(*f*) *Ante*, 1 Vol. 630, 674; *Cohen v. Morgan*, 6 Dowl. & Ry. 8.

(*g*) *Elsee v. Smith*, 2 Chitty's R. 304; 1 D. & R. 97; *Hensworth v. Fowles*, 4 B. & Adolph. 449.

(*h*) *Rex v. Stone*, 2 Lord Raym. 1545.

(*i*) Paley on Conv. 80.

cases, to allow *any person* to inform and swear to the offence, so as to obtain a summons; though if the injury were private, the party aggrieved is to have the compensation, unless he has given evidence. (*k*) But it is not necessary, although usual, to state the place of abode, or degree or addition of the complainant.

Where the statute upon which the proceeding is founded provides that a party *seizing* or *doing any other act* shall have part of a forfeiture or reward, then the facts should be charged accordingly in the information, or at least they must appear in the recital of the evidence, in the conviction as well as in the adjudication. (*l*)

In cases where a penalty is given partly to the informer and partly to the poor of a parish or other person, it is not necessary that the information should shew that it is made *qui tam*. (*m*)

It has been supposed that the information itself should shew *the time* when it was exhibited, in order that it may appear to have been within due time. (*n*) But this is an error; it is true that the *conviction* must shew that the information was exhibited in due time, (*o*) but it is not necessary that the information *itself* should shew when it was exhibited.

The time of exhibiting the information.

The same observation also applies to the supposed requisite that an information must shew *the place* where it was exhibited. (*p*) A magistrate who finds that the information is exhibited to him for an offence out of his jurisdiction, certainly cannot proceed to issue even his summons; and his conviction must shew that all the proceedings were within his jurisdiction.

Place of exhibiting the information.

As regards the statement of the name and *exact authority of the magistrate*, although facts establishing a sufficient jurisdiction must unquestionably be shewn in a conviction, (*q*) yet it would probably be otherwise in an information; and it would suffice if it were in fact exhibited to the *proper* justice. (*r*)

Statement of magistrate's name and jurisdiction.

After the statement in the information of the coming of the informer on a named day, and at a stated place, before a parti-

(*k*) *Ante*, 132 to 143.

(*l*) *Rex v. Smith*, 3 Maule & S. 133.

(*m*) *Rex v. Lovett*, 7 T. R. 152; Com. Dig. Action on Stat.

(*n*) 1 Lord Raym. 510; 2 Lord Raym. 1546.

(*o*) *Rex v. Picton*, 2 East, 196; *Rex*

v. Kent, 2 Lord Raym. 1546.

(*p*) *Kite and Lane's case*, 1 B. & Cres. 101.

(*q*) 2 Salk. 471; 1 Stra. 261.

(*r*) *Scoble*, the books in general confound the requisites of an information with those of a conviction.

CHAP. IV:
SUMMARY PRO-
CEEDINGS, &c.

ticular justice, it is usual to allege that on, &c., at, &c., the offender did, &c., sometimes stating his particular situation, (as when the proceeding is against the occupier for pursuing game, even on his own land, when the game is reserved, under the 1 & 2 W. 4. c. 32. s. 12).

The name and
description of
offender.

The name or accurate description of the offender or offenders must be stated; for otherwise a conviction would not afford him any protection from another proceeding for the same cause. We have seen who may be joined. An information against A. B. *and Co.*, not having a corporate name, would be invalid; (s) but a particular statute, as the General Turnpike Act, 3 G. 4. c. 126, sometimes authorizes a summary proceeding against a party without naming him, if he have refused to disclose it; (t) and even in cases where the name is known, and must therefore be stated, there is no occasion to add any addition of place or degree; for the statute of Additions, 1 Hen. 5, only relates to proceedings to outlawry, and does not apply to summary proceedings. (u)

The time of
committing the
offence.

As respects the *time* of committing the injury or offence, it is certainly essential to name *some* day, the same as in indictments and declarations; (v) and this with professed precision. (w) It is also advisable, to avoid all discussion, to state the *real* day; and some justices have *erroneously* supposed that the witnesses must afterwards, on the hearing, positively fix upon some precise and single day, when they allege the offence was committed, nearly corresponding with the time laid in the information. But the *proof* need not correspond with the statement of the time; for even in an indictment for murder, or other capital offence, a variance as to the day, month, or even year, is immaterial; and it would be singular that more strictness should be required in case of an offence less than a misdemeanour than in a prosecution for a capital crime; (x) and laying the offence on the 20 June, omitting *of* June, does not afford any valid objection; (y) and when an information is exhibited in the same month as that in which an offence has been committed, the words "*last past*" will not necessarily be construed to denote

(s) *Rex v. Harrison*, 8 T. R. 508.

(t) 3 Geo. 4, c. 126, s. 132.

(u) *Rex v. Burnaby*, 2 Lord Raym. 900; 1 Salk. 181.

(v) *Rex v. Puller*, 1 Salk. 369; *Rex v. Cathered*, 2 Stra. 900; 14 East, 272.

(w) 1 Lord Raym. 509.

(x) *Rex v. Chandler*, 1 Salk. 378; 1 Lord Raym. 581; Carth. 502; and see as to *place*, *R. v. Woodward*, 1 Mood. Cr. C. 323, *post*.

(y) *R. v. Huggins*, 3 Car. & P. 602.

a month in a preceding year. (z) But if the offence be alleged to have been committed between two named days, that would exclude the proof of an offence committed before the first or after the last of those days. (a) As that mode of stating an offence is allowed in informations, it may be advisable, when the exact day is doubtful, to allege that it was committed on a certain day, without naming it, between the — day of — and the — day of —, taking care to state days sufficiently distant from each other to include the real day. (b) When a statute *recently* passed has enacted that if a party commit an offence after a named day, he shall be liable to a penalty, it has been usual to aver that the offence was committed after that day; but not so when the statute has been long enacted, and in no case is the allegation necessary. (c) It is usual also, when a particular statute limits the time within which the prosecution must be commenced, to aver that the offence was committed within that time, as “and within three calendar months now last past;” but this also is unnecessary. (d)

Sometimes the nature of the offence requires *local description*, and then accuracy will be essential; and when the penalty or a part, is given to the poor of the parish where the offence was committed, then the parish where the offence was committed must be very accurately stated, according to the truth; (e) and if the statute require the offence to be prosecuted before justices *next* to the place where the offence was committed, then accuracy in the local description may be essential; (f) and it must be expressly averred that the precise place where the offence was committed was in the county where the justices have jurisdiction. (g) But in general the name of the parish or place is immaterial to be proved as alleged; and where there was no place of committing the offence charged in the information, as stated in the conviction, the Court held that the place was to be intended to have been laid where the information was made; (h) and even the statement of a fictitious parish in an indictment has been holden immaterial, although it be expressly

The place of
committing the
offence.

(z) *R. v. Crisp*, 7 East, 389.

(a) Hawk. B. 2, ch. 25, s. 82.

(b) *R. v. Chandler*, 1 Salk. 378; *R. v. Speed*, 1 Lord Raym. 583; *R. v. Simpson*, Gilb. 282; Bunb. 223; id. 262.

(c) Gilb. Cases L. & E. 242; 1 Saund. 309, note 5.

(d) 2 East, 340; id. 362.

(e) *Clarke v. Taylor*, 2 Esp. R. 213.

But if extra parochial, when not material, 2 Lord Raym. 1478; 6 T. R. 540.

(f) *R. v. Chandler*, 14 East, 267, ante, 155.

(g) *R. v. Edwards*, 1 East R. 278; *R. v. Chandler*, 14 East, 267; *R. v. Hasell*, 13 East, 139; 2 Lord Raym. 1220.

(h) *R. v. Swallow*, 8 T. R. 284.

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

proved that there is no such parish in the county. (i) The offence must always be stated in the *body* of the information, and proved to have been committed in the *county* within which the information was laid, and the statement of the county merely in the margin will not suffice; (k) and this even in cases where a form of conviction is given, which does not expressly require the statement of place. (l) In general, even in cases where the precise place is immaterial to be proved as laid, yet it has been held necessary to state either a new place, or to repeat "then and there" to every fresh sentence or allegation, or the information is bad, and the conviction would be quashed. (m) But it suffices to repeat the town or parish *aforesaid*, without also adding in the *county aforesaid*. (n) It was held, that if a man standing in one parish or county shoot at game in another, he uses the gun in the district in which he stands. (o) There is no intendment, either in allegation or evidence, in favour of a place having been within the jurisdiction; and therefore, although it was proved that a *house* was within the proper county, and that a private still was found concealed in a *garden belonging to such house*, yet for want of express evidence that such garden also was within the jurisdiction, the conviction was quashed. (p)

Description of
the offence
itself.

The safer course, it has been said, is to describe the offence itself, either affirmatively or negatively, in the very words of the statute; (q) but a variation from the precise words of the statute is not fatal, if the words used are such as bring the case within the plain meaning of the act. (r) Besides the words of the act, there must also be *particularity* in regard to *time, place*, and such *other essential circumstances* as may be necessary for *certainty and precision*; for although the statute be general in its terms, yet the *information and evidence* must nevertheless frequently be *particular*; (s) and as a general rule, an information and conviction must be as certain as an indictment. (t)

The requisite
particularity.

(i) *R. v. Woodward*, 1 Moody's Crown Cases, 323; but see *R. v. Jeffries*, 1 T. R. 241.

(k) 8 Mod. 309; 2 Lord Raym. 1220; 1 Saund. Rep. and notes.

(l) *R. v. Hazell*, 13 East, 136; *Kite and Lane's case*, 1 B. & C. 101.

(m) *R. v. Hazell*, 13 East, 139; and *R. v. Edwards*, 1 East, 278.

(n) *R. v. Burnaby*, 2 Lord Raym. 901.

(o) *R. v. Alsop*, 1 Show. 339.

(p) *R. v. Chandler*, 14 East, 267.

(q) *Cohen v. Morgan*, 6 Dow. & Ry.

8; Per Lord Holt, in 1 Lord Raym. 581, 583; 1 Salk. 378; *R. v. Marsh*, 2 Bar. & Cres. 717.

(r) Per Bayley, J. in *R. v. Ridgway*, 5 B. & Ald. 527; 1 D. & R. 123.

(s) In *R. v. Chapman*, Sayer, 203, a conviction in the words of the statute, "robbing an orchard," without saying of what, was holden, bad; and see *R. v. James Caldecott*, 458; *R. v. Jervis*, 1 Burr. 152; *R. v. Perrott*, 3 M. & S. 379.

(t) *R. v. Pain*, 5 Bar. & Cres. 251; 7 D. & Ry. 678. S. C.

Thus, although a statute enact, that if any person "*rob an orchard*," he shall be subjected to a specified punishment, it will not suffice in an information to allege that the defendant, on, &c., at, &c. robbed a certain orchard, but it must be shewn what in particular he robbed, in order that the justice and Court may judge whether it was a robbery within the meaning of the statute; (u) and in an information against journeymen for entering into a *certain agreement* for the purpose of controlling a manufacturer, it has been considered that the agreement itself ought to be set forth, so that the Court may judge whether its terms contravened the statute; (v) but the authority of that decision has been questioned. (w) We have seen some instances of the requisite *certainly* as to *number*. (x) When the penalty or amount of damages to be awarded could depend on quantity or quality, then, in general, the number must be stated, or the information or conviction would be insufficient; (y) but where there is a *fixed penalty* for committing some illegal act, or even where a tenant has been guilty of a fraudulent removal, to prevent a landlord from distraining the goods of his tenant, it has been decided that then the number or description of goods so removed need not be stated. (z)

In all cases, when by the terms of a particular statute, the information itself is required to be *on oath*; or when in support of an information, the oath of a credible witness of the offence is required, before the magistrate can legally issue his *summons*, much less a *warrant*: (a) then it is incumbent on him to take care that such informer or deponent do state in such oath the particular facts *as they occurred*, and that he do not swear as it is termed by the card in the *very words* of the act; (b) and, unless facts are apparently truly sworn essential to constitute the offence complained of, the magistrate should not issue even his *summons*, and certainly not a *warrant*, upon a *general* information, however technically correct. (b)

When an information or oath, merely in the words of the statute, will not suffice.

On the other hand, the information and oath should be as extensive in the statement of the offence, as the then supposed facts will warrant; for the informer cannot afterwards, on the

Should be as extensive as the facts will warrant.

(u) *R. v. Chapman*, Sayer, 203; *R. v. Schoyn*, 2 Chit. R. 522, but see *R. v. Rabbits*, 6 Dowl. & R. 341, *infra*.

(v) *R. v. Neild*, 6 East, 417.

(w) Per Abbott, C. J. in *R. v. Ridgway*, 5 B. & Ald. 527.

(x) *Ante*, 145, and *supra*.

(y) *Id. ibid.*

(z) *R. v. Rabbits*, 6 Dowl. & Ry. 341. See *quære supra*, note (u).

(a) All the recent acts, 9 Geo. 4, c. 31, and 7 & 8 Geo. 4, c. 29, and ch. 30, and 1 & 2 W. 4, c. 32, require *such oath*.

(b) *Cohen v. Morgan*, 6 Dowl. & Ry. 8.

CHAP. IV. hearing, give evidence of a larger or a different offence than that stated in the information. (c)

The information must charge an offence equal to that prohibited, either in the express words of the act, or substantially so.

The information also must charge the offence, either in the *precise terms* of the act, or in words which are *synonymous* or equivalent to the same offence; and therefore, whilst the statute 5 Ann, c. 14, was in force, an information charging that "the defendant *killed a hare*," instead of saying that he *used a greyhound to kill and destroy game*, the conviction thereupon was quashed; (d) or if a statute declare the offence to be killing hares or fish in an "*inclosed place*," the information must aver accordingly. (d) So where the then Smuggling Act, 45 Geo. 3, c. 121. s. 7, subjected any British subject to a penalty, when found on board a ship, *in a certain situation*, an information not describing the defendant accordingly, was holden invalid; (f) but the unnecessary *addition* of words, not altering the effect of the charge, will not prejudice. (g)

Information must be positive, &c.

An information also must be *positive*, (h) and not by way of *recital*; (k) nor be *argumentative*, (l) nor in the *alternative*, as that the defendant killed, or attempted to kill, or sold beer or ale; (m) and if it should be defective in either of these respects, the defendant might object on the hearing; or if the conviction should *continue* the defect, the same might be quashed; and though it has been supposed, that probably if the justice in the conviction should state that the defendant was only guilty of one precise act, the objection would be aided; (n) yet it has been decided, that an information on the 48 Geo. 3, c. 143, for selling beer or ale without an excise license was bad, and a conviction thereon, finding that the defendant sold ale only, was quashed. (o) If the particular statute contain either of the words, *maliciously, wilfully, knowingly, unlawfully, &c.*, then the information, at least, if not the evidence and conviction, must aver and maintain, that the defendant with that motive, knowledge, or illegality, committed the act. (p)

Particular words in the statute descriptive of offence, when essential.

Averments negating exemptions or qualifications.

If there be any *exemption, exception, or qualification*, in the

- (c) *R. v. Wilson*, Mr. Justice Ashurst's paper books, and *post*, tit. Conviction.
 (d) *R. v. Morgan*, 2 Chit. R. 563.
 (e) *R. v. Sadler*, 2 Chit. R. 519; *R. v. Moore*, 2 Lord Raym. 791.
 (f) *Ex parte Hawkins*, 2 B. & Cres. 31.
 (g) *R. v. Ridgway*, 5 B. & Ald. 527.
 (h) *R. v. Bradley*, 10 Mod. 155.
 (i) 2 Stra. 900; 2 Lord Raym. 1363.
 (l) 1 Salk. 373.

- (m) *R. v. North*, 6 Dow. & Ry. 143; *R. v. Pain*, 5 Bar. & Cres. 251; 7 Dowl. & R. 678.
 (n) *R. v. Sadler*, 2 Chit. R. 519.
 (o) *R. v. North*, 6 Dowl. & R. 143; and see *R. v. Pain*, 5 Bar. & C. 251; and 7 Dowl. & R. 678, S. C.
 (p) *R. v. Jukes*, 8 T. R. 536; *R. v. Ridgway*, 5 B. & Ald. 527; when need not, *R. v. Marsh*, 2 B. & Cres. 720.

enacting clause which imposes the penalty, or in a *proviso therein*, or even in any *other* clause that ought to be read as *part thereof*, although printed in a distinct section ; then it is necessary, after stating the offence or act complained of, to aver or state that the offender was not within such exception or qualification ; but when the exemption or qualification comes in a *subsequent* clause *not referred to* in the enacting or penal clause, then no such averment is necessary, and the defendant must bring himself within the exception, as a cross and distinct ground of defence. (q) But it has been lately held, that the mere placing the proviso in the same section of the printed act does not make it necessary to notice it in an information or conviction, or in pleading, unless it is also incorporated in or referred to in the *enacting sentence* ; as by the words “except “as hereinafter mentioned,” for statutes are not divided into sections, upon the rolls of Parliament. (r) When necessary to negative exceptions at all, it is necessary to negative each distinctly in an *information*, and not in a general sweeping allegation ; although it would be otherwise in a *declaration* upon the same act, and for the same penalty. (s) The most frequent instances of convictions having been quashed for this defect, were cases under the now repealed Game Act, for the penalty incurred, by using a gun to kill game, not being qualified, in which it was held necessary to negative all the qualification in the enacting clause ; (t) although it was considered otherwise as to exemptions, introduced in a *subsequent* enactment, of which the defendant must take advantage by bringing himself within the exception ; and the prosecutor need not adduce any negative evidence. (u) Numerous other instances, however, have frequently occurred (v) ; and under the 12th section of the recent Game Act, 1 & 2 W. 4, c. 32, an information for the 40s. penalty against *an occupier* of land, for pursuing game in his own land must, it is apprehended, aver, in the terms of the section, that he committed the offence *without the authority of the lessor, &c.*, (w) although the same act requires the defendant to prove the affirmative of any defence, (x) and which seems to be now established as a *general rule* ; so that the now requiring an in-

(q) 1 T. R. 144 ; 6 T. R. 559 ; *R. v. Jukes*, 8 T. R. 542 ; *R. v. Jervis*, 1 East, 646, 7 ; *R. v. Matters*, 1 B. & Ald. 362 ; 2 Chitty's R. 582 ; 6 B. & C. 430 ; 3 B. & C. 189.

(r) 3 B. & C. 189 ; and see observations in *Valasour v. Ormrod*, 6 B. & C. 430 ; as to *declarations* on Statutes, 1 Chitty on Pleadings, 255, 6, 404, 5.

(s) 1 T. R. 144 ; 1 Lev. 26 ; 1 East, 639 ; 2 Comyn. Rep. 524.

(t) *R. v. Wheatman*, Dougl. 346.

(u) *R. v. Hall*, 1 T. R. 320. *R. v. Turner*, 5 M. & S. 206.

(v) *R. v. Jukes*, 8 T. R. 542.

(w) *Ante*, 142, 146.

(x) *Id.* 1 sect. 42.

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

formation to negative in detail all the exceptions, when the prosecutor need not adduce any evidence in support of his allegation, is not perhaps of any practical utility; excepting that it may suggest to the defendant and to the magistrate some legal grounds of defence; (y) and one of the greatest lawyers (z) that ever presided in the Court of King's Bench frequently expressed his wish that justices would always, when an information is preferred, interrogate the informer and his witnesses before he issued his summons or warrant, whether there was not some circumstance, stating each, which might under the act constitute a defence, and not to proceed until he was satisfied that at least it was most probable there was not a *prima facie* defence; by which means, he observed, much trouble and many frivolous informations would be avoided.

Conclusion,
*contra formam
statuti.*

When an information is for an act or omission that did not constitute an offence at common law, then, after stating the commission or omission, the information should aver that the offence was committed *contrary to the statute in that case made and provided*; (a) and the rules affecting indictments (b) and declarations (c) in this respect would apply and must be consulted. If the allegation, when necessary, has been omitted in a declaration, the defect is fatal, even *after verdict*; (d) and though the omission in an *indictment* or *information* for a *felony* or *misdemeanor* is now aided after verdict or outlawry or confession or default, by the 7 G. 4, c. 64, s. 20, yet that act does not extend to *offences* punishable by summary proceedings before justices; and, though in one case, Lord Kenyon observed, that magistrates ought not to be entangled in greater forms and ceremonies than the Superior Courts; (e) yet on the other hand, at least *as much form is essential* in summary proceedings as in indictments; (f) and Abbott, C. J., speaking of the certainty required in convictions, observed, that he knew of no authority which held that a conviction should not have as much *certainty* as an indictment. (g) And the general form of conviction given in the statute 3 Geo. 4, c. 23, supposes that the *information* has concluded "*contra statuti*,"

(y) *R. v. Turner*, 5 M. & S. 206; *R. v. Marsh*, 2 B. & Cres. 717; and *post*, evidence.

(z) Lord Tenterden.

(a) *Information and Conviction*, Burn J. 26th edit. 3 Vol. 351; tit. Indictment.

(b) *Indictments*, 1 Chit. Crim. L. 290.

(c) *Declarations*; see the rules col-

lected, 1 Chitty on Pleading, 5th edit. 405 to 407.

(d) 3 B. & Cres. 186; 2 East, 333.

(e) *R. v. Swallow*, 8 T. R. 286; but see 2 T. R. 222; 8 T. R. 542.

(f) *Ante*, 164, note (t), per Lord Kenyon, in *R. v. Swallow*, 8 T. R. 286.

(g) In *R. v. Pain*, 5 Bar. & C. 251; 7 Dowl. & R. 678, S. C.

and as that form of conclusion when unnecessary, would be rejected as surplusage, the safer course in cases of the least doubt, is to conclude "against the form of the statutes" (in the plural), which can never prejudice. (*h*) If the allegation be omitted when necessary, the defendant might object to the information on the hearing, though after conviction defects in form therein are aided. (*i*) It is not however necessary to state any legal conclusion, as that, "thereby and by force of the statute," &c., the offender forfeited the penalty. (*k*)

It has been supposed not to be necessary, in an information for an assault and battery, to conclude, contrary to the statute; (*l*) but it will be at least prudent to introduce the allegation; for though the injury was illegal at common law, yet the statute gives the peculiar remedy with certain qualifications, and the penalty is to be appropriated in aid of the county rate, and therefore the statute should be referred to; and the proceedings for injuries in the nature of larceny, (*m*) and for small malicious injuries to personal or real property, (*n*) do so conclude; and as the penalties recoverable under the recent Game Act, 1 & 2 W. 4, c. 32, are entirely given by that act, the information must charge that the offences were committed against it.

The reason why the omission of the words "*contra pacem*," in an information, is immaterial, has been assigned to be, because these summary proceedings are not by the King, and he can have no fine upon them for the breach of the peace; (*o*) but as part of the technical description of any injury amounting to a trespass, it is at least proper to introduce those words.

An information may certainly contain *several counts*, either for different injuries or offences committed on the same or different days, and so as to subject the party to several penalties; or different counts, varying the statement of the same injury, may be introduced; (*p*) and the information may be valid, for such offences as have been well laid and proved, although the same may fail as to any defective or unproved count. (*q*)

Several counts
for different
offences, or
varying des-
criptions.

(*h*) Cowp. 683.; 5 T. R. 162; 2 Leach, 585.

(*i*) 3 Geo. 4, c. 23, s. 3.

(*k*) 3 Bar. & Cres. 189; and see 2 East, 338; 7 East, 616.

(*l*) Burn J. 26th edit. Assault, 1 Vol. 274, 5.

(*m*) Burn J., 26th edit. Larceny, 3 Vol. 599.

(*n*) Id. p. 740, 742.

(*o*) 1 Salk. 372; *R. v. Chandler*, 1 Lord Raym. 581.

(*p*) *R. v. Swallow*, 8 T. R. 284; 1 Saund. Rep.

(*q*) 2 Hawk. chap. 26 and 19; but see *R. v. Patchet*, 5 East, 344; *R. v. Catherall*, 2 Stra. 900; 1 Smith R. 547; Cowp. 728.

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

Prayer that the
offender be
summoned.

The information in general concludes with a *prayer* that the offender be summoned to answer the complaint, either before one or two justices, as the law may require; but this part of the form seems wholly unnecessary, for it would be the duty of the magistrate, upon the mere statement of the offence, in a case free from doubt, to issue his summons without any formal prayer that he do so.

Defects in an
information,
when and how
aided.

In stating the requisites of an information, we have necessarily occasionally considered what objections are or not material, and how they may be aided by the defendant waiving any objection in respect of form, and allowing the merits to be proceeded in. The proper and only time to object to mere defects *in form*, is in the first instance, and at all events before conviction; for the 3 Geo. 4. c. 23. s. 3, enacts, "that in all cases
"where it appears by the conviction that the defendant has
"appeared and pleaded, and the merits have been tried, and
"that the defendant has not appealed against the said conviction, where an appeal is allowed, or if appealed against the
"conviction has been affirmed, such conviction shall not afterwards be set aside or vacated in consequence of *any defect of form whatever*, but the construction shall be such a fair and
"liberal construction as shall be agreeable to the justice of the
"case." This enactment only applies *after* conviction, and after the defendant has appeared, and *not before*, nor where the defendant does not attend in pursuance of the summons; and even where he has appeared, care must be observed to keep in view the distinction between what is strictly considered matter of *form*, and what is matter of *substance*, and some of the decisions on which have already been mentioned. (r)

Form of informations in
general.

Having in the preceding pages considered the requisites of an information, (s) and referred to one general form of information as regards its commencement and conclusion, (t) it may be here useful in practice to give the forms to be observed under the particularly enumerated statutes most frequently proceeded upon, viz., the 9 Geo. 4, c. 31, as to common assaults and batteries; the 7 & 8 Geo. 4, c. 29, as to petty stealings not indictable; the 7 & 8 Geo. 4, c. 30, as to small, wilful, or malicious injuries, not indictable; and the 1 & 2 W. 4, c. 32, for the protection of game. (u)

(r) *R. v. Jukes*, 8 T. R. 536, *ante*, 157.
(s) *Ante*, 155 to 170.

(t) 156, note (t).

(u) See the long note in next page.

We have seen that sometimes the statute giving the summary proceeding, allows a *complaint* of a party aggrieved, or other person *without oath*; but all the four modern acts which we have particularly considered, appear to require that the justice shall

CHAP. IV.
SUMMARY PROCEEDINGS, &c.

Sixthly, Oath or deposition after information and before summons.

Complaint or information for a common assault and battery, on 9 G. 4, c. 31. s. 27.

(u) Hertfordshire, to wit: { The information and complaint of *A. B.*, of the parish of —, in the county of —, yeoman, a credible witness in this behalf, *made upon his oath* (*), before *E. F.*, Esquire, one of the justices of our Lord the King, assigned to keep the peace of our said Lord the King, in and for the said county of Hertford, and also to hear and determine divers felonies, trespasses and other misdemeanors in the said county committed, on the — day of —, in the — year of the reign of our said Lord the now King, and according to the statute in that case made and provided, who saith, that (+) *C. D.*, of the said parish of —, in the said county, yeoman, within three calendar months last past, and on the — day of —, A. D. — [(+) with force and arms and with a certain horsewhip, and with a stick, and with his fist, at the said parish, and within the said county, unlawfully made an assault upon him the said *A. B.*, then being in his own dwelling-house there, and did then and there strike and beat the said *A. B.* several times with the said horsewhip, and stick, and his fist, and did then and there collar and shake, and pull about the said *A. B.*, and knock him down violently, to and upon the floor and ground there, and also then and there kicked the said *A. B.*, and gave and struck him the said *A. B.* divers severe and violent blows, and beat, bruised, and wounded him, and then and there otherwise greatly illtreated the said *A. B.*, and thereby the said *A. B.* then and there became and was ill, and so remained and continued for three days, and thereby the said *A. B.* incurred and sustained an expence of 2*l.* in endeavouring to be cured of his said illness, so occasioned as aforesaid, and against the peace of our said lord the King] and contrary to the form of the statute in such case made and provided, whereby he the said *C. D.* hath forfeited for his said offence the sum of 5*l.* And thereupon the said *A. B.* prays that the said *C. D.* may be summoned to answer the premises before two justices of the peace in and for the county aforesaid according to the statute aforesaid.

A. B.

Sworn before me, *E. F.*, a justice, &c.

[Same as the first form, excepting in the statement of the offence, which must depend on the facts; the description of stealing a dead fence under sect. 40, may be thus: "That *C. D.*, of, &c. labourer, within three calendar months last past, and on — did unlawfully break and throw down with intent to steal the same, a part, that is to say, one yard in thickness and three yards in length, of a certain dead fence of the same *A. B.*, then standing within the parish of —, and in the said county of —, and then being the property, and in the possession of the said *A. B.*, and then being upon and belonging to a certain close of the said *A. B.* there and of the value of five shillings, contrary to the statute in that case made and provided, and whereby the said *C. D.* then and there forfeited the said value of the said dead fence, and a sum not exceeding five pounds. And thereupon, &c."]

[Same as first, to the brackets, and then as follows: "That *C. D.*, of —, labourer, on, &c. did wilfully, maliciously, and unlawfully, and not acting under a fair or reasonable supposition that he had a right to do the same act, did commit damage and injury to a certain live dog of the said *A. B.*, of the value of five pounds, then in the parish of —, and within the said county of —, by then and there wilfully, maliciously, and unlawfully, and without any reasonable cause, shooting and firing off a certain gun, then and there laden with gunpowder and leaden shot, at and against the said dog, and thereby, and with the same shot, then and there greatly lacerated, wounded, and injured the same dog, contrary to the statute in that case made and provided, and whereby the said *C. D.* then and there forfeited and became liable to pay the sum of 5*l.*, being a reasonable compensation for the said damage and injury so committed. And thereupon, &c."]

(*) 9 Geo. 4, c. 31, s. 33, appears to require an oath before a justice should issue his summons. But such oath may be made by a third person, or by the complainant; see form of oath by a third person, *post*, 173, note (b).

(†) The common assault and battery

is to be stated according to the facts, and shewing any consequential damage. The form of declarations in Chitty on Pleadings, 2 Vol. 850 to 858, or of Indictments, in 3 Chitty's Crim. L. 821 to 827, may be pursued in particular cases.

CHAP. IV. not issue his summons or warrant without the previous "*oath*
 SUMMARY PRO- "*of some credible person,*" of the offence charged in the infor-
 CEEDINGS, &c. mation having been committed. (*w*) This was essential, for
 otherwise parties would be perpetually harrassed by hasty and
 unfounded summonses on the behalf of litigious persons, with-
 out any check, or punishment, or redress, for the loss of time and
 trouble incurred in attending before justices on frivolous and
 unsustainable charges. And for the same reason, magistrates
 should, in the first instance, interrogate the deponent as to all
 the circumstances, and really be of opinion that the story imputes
 a clear offence, and is to be *credited*, before he issues his sum-
 mons. It will frequently occur, that the *party aggrieved* by an
 injury committed against the recent acts, or some other sta-
 tute, may be wholly ignorant of the circumstances under which
 the injury was committed; and, therefore, it is essential that
 some *third* person who witnessed the transaction should be
 enabled to make the necessary oath, upon which to found the
 subsequent proceedings. The terms of such oath ought not to
 be prepared or drawn up, or even taken, until *after* the witness
 has been sworn, because what he states ought to be under the
 influence and sanction of an oath; and the oath must not be
 subsequently applied to a previously prepared narrative, ante-
 cedently reduced into writing. (*x*) In framing such oath, care
 must be observed that it expressly aver that the offence was
 committed at the *same time*, and under the same circumstances
 as those charged in the information, and so as to shew that the
 particular prohibited offence has been committed. Thus, where
 an information had been exhibited against a party for having
then concealed brewing vessels in his possession; and in a de-
 position subsequently made, the deponent swore that the party
now hath in his possession, &c., it was held, that the time did

Information on
 Game Act, 1 &
 2 W. 4, c. 32.
 s. 30, for a
 trespass in
 pursuit of
 game. (*v*)

[Commencement the same as in the first form in this note, to the brackets, and
 then as follows: "That *C. D.*, of, &c. labourer, within three calendar months
 "last past, and on, &c. did unlawfully commit a trespass, by entering into and
 "being in the day time, upon certain land then and there being a close in the oc-
 "cupation of *A. B.*, in the parish of —, and in a certain part thereof within the
 "said county of —, in search for and pursuit of game, snipes, and conies there,
 "contrary to the statute in such case made and provided, whereby the said *C. D.*
 "then and therefore forfeited for his said offence the sum of two pounds. And
 "thereupon, &c."]

(*v*) As to the generality in the de-
 scription of land, see the decision of
 Taunton, J. in *R. v. Mellor*, 2 Dowl.
 Prac. Rep. 173, and Legal Observer,
 6 Vol. 378, and *post*, title Commitment.

An information on the 12th section of
 the act, against an *occupier*, must care-
 fully bring the case within the terms of
 that section.

(*w*) *Ante*, 9 Geo. 4. c. 31, s. 33; 7 &
 8 Geo. 4, c. 29, s. 65; *id.* chap. 30, s.
 30; and 1 & 2 W. 4, c. 32, s. 41.

(*x*) *R. v. Kiddy*, 4 Dowl. & Ry. 734;
 and Mag. C. 364

not necessarily import the same, or refer to the same offence as that charged in the information; and the conviction was therefore quashed, because, as observed by Lord Holt, a conviction must be certain, and not taken by intendment. (z) It will be remembered, that whenever a statute requires a preliminary oath in support of the charge before the justice issues a summons, he should require the deponent to state the facts *exactly as they occurred*, and not merely in the words of the statute, and which if *bonâ fide* stated, will protect the informer or witness so swearing, from any liability for the subsequent proceedings, or for any imprisonment or search that may take place under a warrant founded on such oath. (a) The deposition should, in substance, charge the offence with as much certainty, and with the same negations of any exemptions in the enacting clause, as an information, and may, subject to these observations, be in the subscribed form, when the proceeding is for an assault and battery. (b) And when the oath is upon either of the other statutes, the substance of it should comprise the allegations in the preceding informations, though according to the genuine statement of the witness; (c) and the justice would do well to interrogate the deponent, whether the facts do not fall within some exemption in the enacting, or even the subsequent clauses. If a justice should cause the party to be imprisoned upon his warrant without a *sufficient oath* of an offence having been committed, he would be liable to an action of trespass. (d)

Upon a clear charge of an offence before one or more justices, and when there can be no reasonable ground for doubting the jurisdiction or the propriety of exercising it, a justice *ought* to receive the information and issue his summons or warrant when proper, and cause the charge to be heard; and if he should refuse, he might, in a very clear case, be compelled to act by *mandamus* from the Court of King's Bench, (e) and by some

Seventhly, The duty of a justice to receive an information, and issue process thereon.

(z) 1 Lord Raym. 509.

(a) *Post*, and *Cohen v. Morgan*, 6 Dowl. & Ry. 8; In *Elsee v. Smith*, 2 Chit. Rep. the party *maliciously* stated false facts and grounds.

(b) *E. F.*, of —, labourer, maketh oath and saith, that on, &c. at —, in the parish of —, and in a part thereof within the county of —, he this deponent was present, and did see *C. D.*, of —, labourer, then and there and within the said county [“assault and beat *A. B.*, “by then and there giving him several “blows and strokes with a whip and “with his fists, and by which the said “*A. B.* was, in the judgment and be-

“lief of this deponent, severely bruised Form of oath
“and injured.”] *E. F.* to obtain a
Sworn before me this — day of summons.
—, A. D. —, at —, in the
county of —.

Y. Z., a justice, &c.

(c) See forms of Informations, *ante*, 171, 2, in note.

(d) *Morgan v. Hughes*, 2 Term Rep., and *post*, Liability of Justices.

(e) *R. v. Wrottesley*, 1 B. & Adolph. 648; *ante*, 1 Vol. 795 to 798; *R. v. Broderip*, 5 B. & Cres. 239; 7 D. & Ry. 861; and see 1 Stra. 413; *id.* 530; *R. v. Benn*, 6 T. R. 198.

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

particular enactments he would incur a penalty for the neglect. (e) But where justices have *reasonable ground for doubting* their jurisdiction, the Court will not compel them to do any act which might subject them to an action; (f) and in a late case, (g) Abbott, C. J., said, "if the conviction itself is not valid in law, "for not having been *founded upon oath*, and the magistrate "issues his warrant to apprehend the party, he will be liable to "an action of trespass; and we cannot compel him to put him- "self in a situation of so much responsibility. If a justice of "the peace criminally forbears to discharge his duty, he is "amenable for his conduct by information, as for a public of- "fence; but that is a very different thing from commanding "him to do that which may subject him to an action." The mere circumstance, however, of a defendant insisting that the justice has no jurisdiction, is not sufficient to excuse the justice in not proceeding, (h) and the Court of King's Bench will issue a *mandamus*, unless it appear very questionable whether the justice has jurisdiction, especially if there be no other course of proceeding; for otherwise the law would remain unadministered. (i) Sometimes the statute "authorizes and empowers;" in other instances, the words are also "required" or enjoined, (k) and in the latter cases the justices are at least bound to proceed to a *hearing*, however they may decide. (l) Where under the law of the Customs there has been a seizure of goods, and the justices refuse to proceed in consequence of the legality of such seizure being questionable, the owner may by *mandamus* compel them to proceed, so as to enable him to reclaim his property. (m)

Eighthly, The
summons.

Whether particularly directed or not, still according to natural justice, a magistrate, unless in cases where he has power and ought to issue a warrant in the first instance, should issue his *summons*, requiring the defendant to appear before one or two justices, according to the nature of the charge; (n) and whatever

(e) Skinner's Rep. 61.

(f) *Ante*, 1 vol. 796; *R. v. Broderip*, 5 Bar. & Cres. 239; 7 Dowl. & Ry. 861; *R. v. Justices of Buckinghamshire*, 1 B. & Cres. 485; 2 D. & R. 689; 1 Dowl. & Ry. Mag. Cases, 369; *R. v. Robinson*, 2 Smith R. 274.

(g) *R. v. Broderip*, *supra*.

(h) *R. v. Wrottesley*, 1 B. & Adolph. 648.

(i) *R. v. Robinson*, 2 Smith R. 274.

(k) 50 Geo. 3, c. 41, s. 21.

(l) See all the cases in preceding

notes, and *ante*, 1 vol. 796

(m) *R. v. Todd*, 1 Stra. 530.

(n) Per Parker, C.J. in *R. v. Simpson*, 10 Mod. 379; *R. v. Benn*, 6 T. R. 198; and see *R. v. Allington*, 2 Stra. 678, 630; *R. v. Venables*, 2 Lord Raym. 1406; *R. v. Constable*, 7 Dowl. & R. 633; 3 Mag. Cas. S. C. *R. v. Colmans*, 8 Dowl. & R. 344. So payment of a poor rate cannot be enforced but after a *demand* and a *formal summons* of a justice; *R. v. Benn*, 6 T. R. 198.

may have been the practice under the Customs or Excise laws, a justice always ought *himself*, to sign such summons after he has heard the charge, and not suffer his clerk to sign the same, or to issue any ready prepared summons. (o) The summons should fully state the charge as in the information, in order that the defendant may know what he has to answer, and may prepare his defence accordingly. But under the game laws it was usual not to set out the negations of all the exceptions fully, as was necessary in the information, but merely to say "he the said defendant not being qualified by the laws of this realm so to do." (p) It is, however, the safest course to copy the whole charge as in the information; and where a particular form of summons is prescribed by the statute, it must be observed. (q) The summons may be directed to the party accused himself; or, unless otherwise prescribed, there may be a *precept* to the constable, ordering him to summon the party; but the former is preferable. It must name a time (r) and place (s) of appearance, and usually, with analogy to other proceedings, should fix a certain hour of the day, and not between several named hours, as between eleven and one; (t) but nevertheless the party must, if the justice or justices be not ready to proceed to the hearing at the appointed hour, wait during all reasonable hours of the same day. (u) If the summons be dated of a day prior to that when the information was laid, and the party do not appear, any subsequent proceedings would be void. (v) So if it be to appear on an impossible day, as on Tuesday the 17th April when the 17th April fell on a Friday, no proceedings could be had thereon, unless the party appear and defend, (w) or perhaps it should appear that he was not misled. (x) The time appointed must always allow sufficient opportunity between the service of the summons and the time of appearance, to enable the party to prepare his defence and for his journey; and the justice should in this respect take care to avoid any supposition of improper hurry, or he may incur the censure of the Court of King's

(o) *R. v. Stevenson*, 2 East, 365; and see *R. v. Constable*, 7 Dowl. & Ry. 663, as to the necessity for regularity and actual interference of the justice himself in all the proceedings.

(p) *R. v. James*, Caldecot, 458; Burn's J. tit. Game.

(q) *R. v. Croke*, Cowp. 30.

(r) *R. v. Dyer*, 1 Salk. 181; *R. v. Picton*, 2 East, 196.

(s) *R. v. Simpson*, 1 Stra. 46; *R. v. Johnson*, 1 Stra. 261.

(t) The practice is so; and see cases

as to notice of inquiry, *Sayer R.* 181; *Barnes*, 296, 302; 2 Stra. 1142; 3 Bos. & P. 1; 1 Chitty's R. 11, 615.

(u) 1 Douglas Rep. 198; Tidd, 9th ed. 579.

(v) *R. v. Kent*, 2 Lord Raym. 1546; but aided probably by appearance and defence, in *R. v. Johnson*, 1 Stra. 261.

(w) *R. v. Dyer*, 1 Salk. 181; cited in *R. v. Hall*, 6 Dowl. & Ry. 84; *R. v. Stone*, 1 East, 649.

(x) 3 Bos. & Pul. 1; 1 Chitty's R. 10; but see *id.* 615.

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

Bench, if not be subject to a criminal information. The precise time will generally depend on distance, and the other circumstances of each particular case. With analogy to other branches of the law, a man ought not to be required *omissis omnibus alijs negotiis* instantly to answer a charge of a supposed offence necessarily less than an indictable misdemeanor, on the same or even the next day, and should be allowed not only ample time to obtain legal advice and assistance, but also to collect his evidence; and even the convenience of witnesses should be considered; and therefore in general several days should intervene between the time of summons and hearing. In the superior Courts, in general, at least eight days' notice of inquiry and of trial are essential for the preparation of the defence; and a charge of an inferior offence may require full as much time, as there has not upon such a charge been any antecedent notice of the proceeding, as in actions; and as these charges are frequently made by parties under sudden excitement, it is better to allow them time to cool; and no inconvenience can result from delay, for if it be expected that the alleged offender will abscond, he may, in many cases, be apprehended in the first instance. Where the summons was to appear on the *same day*, the Court held it extremely unreasonable, as the party's attendance might be impossible, or he might not be able to collect his witnesses on so short a warning; but the Court held the objection aided by the defendant's appearance and entering into his defence without praying further time. (y) It is a general rule in these cases, as well as in proceedings in the superior Courts, that appearance cures the defect and uncertainty either as to time or place; (z) and the safer and only prudent course, is for a defendant, when served too late, nevertheless to attend before the justice, and state his objection to the time, and require an adjournment to another day, and which the justice will be bound to make. (a) But should he not appear, the justice must inquire into the time and circumstances of the service of the summons, and unless it appear to have been quite sufficient, should of his own accord adjourn the hearing and issue a fresh summons, reciting the former. If a justice should wilfully proceed to convict without a previous sufficient summons, or without enlarging the time when required, he may be prosecuted by information or indictment for the misdemeanor. (b) The form of the summons may be as

(y) *R. v. Johnson*, 1 Stra. 261; *R. v. Stone*, 1 East, 464.

(z) *Id. ibid.*

(a) *Ante*, 175.

(b) *R. v. Venables*, 2 Lord Raym. 1407; *R. v. Simpson*, 1 Stra. 46; and see observations in *R. v. Stone*, 1 East, 642, on *R. v. Heber*, 2 Barn. 101.

in the note ; (c) or a precept may be issued to a constable, and who is thereupon to summon the party. (d)

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

It will be obvious that the summons must also be *served* in a reasonable time, before that appointed for the hearing. In ordinary cases, as that of a notice to quit, it suffices that it may be either delivered to the party himself, or may be left at his residence ; and upon proof of the latter, it will at least be *presumed*, that he has actually received it and in due time. (e) But as a party upon a conviction may incur a penalty, and even imprisonment, no such presumption is allowed ; and unless the particular statute authorise a service by leaving the summons at the party's residence, it must be proved on the hearing, that he *actually received* the summons in due time to enable him to attend. (f) Some of the acts, we have seen, expressly authorize the

The service of
the summons.

(c) The form of summons under the 9 Geo. 4, c. 31 ; 7 & 8 Geo. 4, c. 29, and c. 30 ; and 1 & 2 W. 4, c. 32 ; and in general, may be as follows. It will be observed, that those acts require the *oath* of a credible witness before a summons can be issued, though the *complaint* need not be on oath.

To C. D., of ———.

Hertfordshire } Whereas complaint
to wit : } and information in writ-
ing hath been made be-
fore me E. F., Esquire, one of His Ma-
jesty's justices of the peace for the said
county of Hertford, by A. B., of ———,
that you, &c. [here state the offence charged
as in the information] contrary to the
statute in that case made and provided :
And whereas you have also been charged,
on the oath of a credible witness before
me as such justice, with the said offence ;
these are therefore to require you per-
sonally to appear before me [or before
two of his Majesty's justices of the
peace in and for the said county] at the
house called ———, in ———, in the said
county, on ———, the ——— day of ———
next, at the hour of ———, in the ———
noon, to answer to the said complaint
and information, and to be further dealt
with according to law (*). Herein fail
you not at your peril. Given under
my hand and seal (†) this ——— day of
———, A. D. 1834.

E. F. (L. S.)

(d) See form of Precept, Paley on

Convictions, 505.

(e) *Ante*, 1 Vol. 483 ; and *Doe dem. Neville v. Dunbar*, 1 Mood. & Mal. 10.

(f) Per Parke, C. J. 10 Mod. 345 ; *R. v. Chandler*, 14 East, 268 ; *R. v. Colmans*, 8 Dowl. & R. 344 ; and *R. v. Hall*, 6 Dowl. & R. 84 ; *id.* Mag. Cas. 3 Vol. 19.

In *Rex v. Hall*, it was held that the record of a conviction *by default* upon the now repealed Game Act, 5 Anne, chap. 14, must shew that the defendant has been *personally* summoned to appear to the information ; and Abbott, C. J., said, " without giving any opinion, that a *personal service* in all cases is absolutely necessary, it is sufficient to say, that in this case, no sufficient substantial personal service appears to have taken place, and therefore the conviction must be quashed. Bayley, J. It is consistent with every analogy, that a party shall not be concluded, without personal service of the process which is to affect his liberty. It is laid down in Burn, Boscowen, Nares, and other text books, see Burn, J., tit. Conviction ; Boscw. 60 ; Paley, on Convictions, by Dowling, 26 ; that personal service of the summons is necessary, unless where it is expressly dispensed with by statute. Of that opinion was Lord C. J. Parker ; *Rex v. Simpson*, 10 Mod. 345. In that case, there was in fact a personal service ; but the main point decided was, that a defendant who

Form of sum-
mons to the
defendant, on
a complaint
information,
and after oath.

* The form in Paley's Convictions here adds, " and the said A. B. the informer " is also ordered to be then and there " present to make good the said com-plaint and information ; " but those

words are unnecessary.

(†) The sealing, although usual, is not essential in a *summons*, though other-
wise in a warrant.

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

summons to be left at the dwelling-house, and others the service on any inmate there, provided the purport of the summons be explained to them. (g) But in the former case, it must appear that the service was on the wife, or an immediate servant of the party charged. (h) And even in these cases, if the party do not appear, and it be doubtful whether he actually received the summons in time, the magistrate ought to adjourn the hearing, and cause a fresh summons to be served.

Of the warrant
to apprehend
offender.

By the common law, no party could be arrested or imprisoned for an offence, not indictable before he has been indicted or convicted; but it being found that *transient* offenders (to use the language of the modern highway and turnpike acts,) for want of a power to apprehend them, eluded justice; modern acts, we have seen, have introduced in numerous instances, powers to apprehend, even without warrant; (i) and we have seen that the recent acts, 9 Geo. 4, c. 31, s. 33; 7 & 8 Geo. 4, c. 29, s. 65, and c. 30, s. 30, contain express powers for a justice in certain cases if *he shall so think fit*, after oath of the offence, to issue his warrant to apprehend for petty offences in the first instance, and even without any previous summons. (k) In the exercise of this discretionary power, no justice should cause a party to be imprisoned, unless he be satisfied by the *oath* of a credible witness, that the offender is about to abscond, (l) but should issue a summons in the first instance. (m) At all events, before any warrant or imprisonment, there must have been a *formal charge* of an offence within the particular act, or the magistrate will be subject to an action, even for a

did not choose to appear after being duly summoned, might be convicted in his absence. If the defendant appears and makes a defence, it must be taken that he was duly summoned; but if the conviction was by default, it must be clearly shown on the face of the record, that he had been *personally served*, and had an opportunity of being heard. Here it could not be stated that the defendant was personally served, because what is recited is repugnant to the fact. In *Reg. v. Dyer*, 1 Salk. 181, it was stated that the defendant was summoned to appear on *Tuesday*, the 17th of April, &c. In fact the 17th of April fell on a *Friday*, and it being objected that the time of the summons being impossible, it was the same as if there had been no summons, the Court quashed the conviction on this ground, saying "there could be no such day, and there-

fore he could not appear thereupon; and, when one day is set forth, his appearance on another cannot be intended." This is an authority in principle governing the present case. I think this conviction must be quashed, for not showing that the defendant was personally summoned. *Res v. Hall*, 6 Dowl. & Ry. 84.

(g) *Ante*, 131, 137, 141, 143.

(h) *R. v. Clement*, 4 B. & Ald. 218.

(i) *Ante*, 1 Vol. 617 to 633.

(k) And see *Bane v. Methuen*, 2 Bing. 67; 7 J. B. Moore, S. C.

(l) See observations of Lord Tenterden, in *R. v. Birnie*, 1 Mood. & M. 160; 5 Car. & P. 206, S. C.; and of Tindal, C. J. as to transient offenders, in *Hanway v. Boulbee*, 2 Mood. & M. 15; and 4 Car. & Pa. 330.

(m) *R. v. Martyr*, 13 East, 55.

slight and temporary imprisonment; (n) and even in cases where imprisonment before conviction would be legal, care must be observed expeditiously to bring the party before the justice, (o) and that the justice himself proceed *speedily* to a final hearing, and that he do not detain the party an unreasonable time under colour of re-examination. (p) The form of a warrant to apprehend in the first instance, may be as in the note (q). It will be observed, that the recent statutes require an *oath* before any summons or warrant should be issued; and at common law in general, before a man can legally be deprived of his liberty, it is a rule that there must have been *oath* of his having committed an offence, and otherwise only a summons should issue. (r)

Besides the recent acts we have more particularly considered, there were others which contain similar powers of apprehension in certain cases; (s) and when the statute requires the justice to cause *the offender to be brought before him*, it has been considered that this implies an authority to use compulsory process. (t) But unless an express power be given to apprehend before conviction, a justice cannot issue his warrant to imprison in default of appearance to his summons, and can only proceed *ex parte* to a hearing of the informer's evidence, and dismiss the information, or acquit, according to the weight of evidence. (u)

It is a general maxim, that every Englishman's house is his castle, and that no outer door can be broken for the purpose of

Of a search
warrant.

(n) *R. v. Birnie and others*, 1 Mood. & M. 160; *Bridgett v. Coyney*, 1 Man. & Ry. Mag. Cases, 1; 1 Man. & Ry. Rep. 211, S. C.; *Morgan v. Hughes*, 2 T. R. 225.

(o) *Wright v. Court*, 4 Bar. & Cres. 596; 6 Dow. & Ry. 622, S. C.; *Davis v. Capper*, 10 Bar. & Cres. 28.

(p) *Id. ibid.*

(q) Hertfordshire. } To the Constable of —, and all other peace officers of the said county.

Forasmuch as C. D. of —, in the county aforesaid, labourer, hath this day been charged before me G. H. Esq. one of His Majesty's Justices of the Peace, of and for the said county, on the oath of a credible witness, that he the said C. D. on, &c., at, &c., in the said county, did, &c., [here state the offence as stated in the oath or deposition; ante, 165, 171, 2, 3.] contrary to the statute in such case made and provided; and it is further sworn before me by a credible witness, that he verily believes that the said C. D. will abscond or unlawfully

absent himself from and out of the said county, in order to avoid conviction and punishment for his said offence, unless he be forthwith apprehended. These are therefore in pursuance and by virtue of the statute in that case made and provided, to command you in His Majesty's name forthwith to apprehend and bring before me, or some other of His Majesty's Justices of the Peace in and for the said county, the body of the said C. D. to answer unto the said charge, and to be further dealt with according to law. Herein fail you not. Given under my hand and seal, the — day of —, A. D. 1834.

G. H. (L. s.)

(r) 2 Barnard, 34, 77, 101; *Morgan v. Hughes*, 2 T. R. 225.

(s) 42 Geo. 3, c. 119, s. 4; 47 Geo. 3, sess. 2, c. 78, s. 146; 50 Geo. 3, c. 41, s. 25.

(t) 1 Paley Conv. 24, on 19 Geo. 2, c. 21, s. 4.

(u) *R. v. Simpson*, 10 Mod. 341, 378; 1 Stra. 44; *Dillon's case*, 2 Salk. 490.

Form of war-
rant to appre-
hend, to answer
a summary
complaint or
information.

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

apprehending him, except in cases of treason, felony, or breach of the peace, or contempt of the House of Lords or Commons; and though if an outer door be open, a person may if he be certain that his goods are therein, and illegally placed there by the occupier, lawfully enter to take the same away, yet he does so at his peril, and is subject to an action of trespass if it should turn out that his goods were not there; (u) and until the recent enactment, a search warrant could only be obtained upon an oath that a *felony indictable*, or *misdemeanor*, had been committed, and shewing reasonable suspicion that the stolen goods were concealed in a particular house; (v) and if such a warrant were maliciously obtained without reasonable cause, the party obtaining and acting under it, is subject to an action on the case; (w) and if the warrant were illegal in form, the magistrate is liable also to an action of trespass. (x) But now we have seen, that the 7 & 8 Geo. 4, c. 29, s. 63, enacts, "That if
" any credible witness shall prove upon oath before a Justice of
" the Peace, a reasonable cause to suspect that any person has
" in his possession, or on his premises, any property whatever,
" on or with respect to any *such offence* (i. e. any illegal *steal-*
" *ing* of personalty or part of the realty, not constituting
" felony, or indictable misdemeanor, but punishable summarily)
" shall have been committed, the justice may grant a warrant
" to search for such property, as in the case of stolen goods."
The course of proceedings in the case of a search warrant, where goods have been *feloniously* stolen, will in general apply. (y)

To obtain a search warrant under this act, there must, by the terms of the act, be an *oath* of a *reasonable cause to suspect* that a named person has in his possession or on his premises at, &c., according to the facts, certain named property stolen. The oath need not swear absolutely to any stealing, but only to suspicion, and *stating the circumstances*. (z) The warrant may be framed in substance from the forms in Burn's Justice, (a) and should in terms in general only authorize a search in the *day time*, (b) though there may be exceptions. (c) The entry into a dwelling-house of another, upon the imputation of his having there concealed stolen property, is so strong a measure,

(u) *Ibid.*, 1 Vol. 641 to 646.
(v) Burn's Justice, title Search Warrant; *Elsee v. Smith*, 2 Chit. R. 304; *Hensworth v. Fowkes*, 4 B. & Adolph. 449.

(w) *Elsee v. Smith*, 2 Chitty's R. 304.
(x) *Id.* *ibid.*

(y) Burn J. tit. Search Warrant.
(z) *Elsee v. Smith*, 2 Chit. R. 304.
(a) Burn's Justice, tit. Search Warrant.
(b) 2 Hale, 150.
(c) Barlow's Justice, title Search Warrant.

and so injurious to character, that upon charges in these cases of *small offences*, a very strong case of *guilt* should be established before a justice should issue a warrant of this description.

CHAP. IV.,
SUMMARY PRO-
CEEDINGS, &c.

Before the hearing, the informer and the defendant must respectively consider the means of obtaining the appearance of witnesses and the production of documents. But it is questionable whether Justices of the Peace *out of sessions*, have in the absence of *express* authority given by the particular act, any power of summoning witnesses before them for or against a summary proceeding; at least they have no power of *enforcing* attendance. (d) But such a power has been given, though only in *particular cases*, by modern acts; and sometimes penalties (as in the game act, 1 & 2 W. 4, c. 32, s. 40,) of even 5*l.* have been imposed upon witnesses in case of non-attendance. (e) But no such power is given by 9 Geo. 4, c. 31, or 7 & 8 Geo. 4, c. 29, or c. 30. The want of such a power renders the jurisdiction very imperfect; for a complainant, for want of it, may be unable to proceed, and a defendant may be unjustly convicted, because he may not have been able to enforce the attendance of a material witness, and who may have been kept back by the complainant. It would be *unaccountable* that the legislature should omit giving the power in the three *principal* and *general* acts, so very extensive in the enactments, and yet anxiously give it, and impose a penalty, in the statute 1 & 2 W. 4, c. 32, s. 40, were it not that the latter act relates to *game*, a property, which in the estimation of some persons, is superior to all others in ideal value. To supply this manifest defect in other cases, a magistrate would be justified in dismissing the complaint, in case a material witness should neglect to attend.

Of securing
evidence and
attendance of
witnesses.

In the case of an examination upon oath of the owner of demolished buildings, or his servant, in order to found proceedings against the hundred, it has been held to be no objection that the examination was brought ready prepared to the magistrate, if he do not require any further communication. (f) But in general, the statement of any *material* evidence should not be drawn up until the parties are before the justice. We shall consider the application of this rule hereafter, when ex-

(d) Paley Conv. 33; Burn J. tit. Evidence; 2 Vol. 82.

(e) And see 7 Geo. 4, c. 33, s. 20.

(f) *Lowe v. Broxtowe*, 3 Bar. & Adolph. 550; *ante*, 1 Vol. 580, 1.

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

amining the conduct to be observed when preparing for the trial of an action.

The proper course, as well for the complainant as the defendant, is, as soon as practicable after the service of the summons, to apply to the justice who issued the summons, for his summons to each material witness; and as the issuing the same would be in *furtherance* of an authorized proceeding, and at least an innocent act, even when not expressly authorized, a justice should, when essential to justice, grant it *valeat quantum*; and when an express power has been given to summon witnesses, as in the Game Act, 1 & 2 W. 4, c. 32, s. 40, one or two justices are to *sign* the summons, and in case of neglect to attend at the time and place appointed, and no sufficient excuse being proved, or if he should refuse to answer, he forfeits not exceeding 5*l.*, recoverable also by summary proceedings. The form of summons may be as subscribed. (g) The competence of witnesses, and their evidence, will be presently considered.

The hearing,
and proceed-
ings before one
or two jus-
tices, &c.

At the appointed hour, the complainant or informer, with his witnesses, and the party charged, with his evidence, are to attend before the justice or justices, and wait, as we have seen, a reasonable time until he be ready. (h) But a magistrate who is not as punctual as his other *official* duties will admit, is unfit for his station. The hearing and proceedings before the drawing up the formal conviction, may be considered with reference to the following several points, viz., the jurisdiction of the justices, and their number and character; the non-appearance of the defendant, and proof of the summons; the adjournment by the justices; the right to appear and be assisted by counsel, attorney, or friend; the reading of the information; the objections to the information; the mode of conducting the hearing;

Form of sum-
mons to a
witness.

(g) County of } Whereas informa-
Hertford. } tion hath been made
by A. B., of —, before me G. H.,
Esquire, one of His Majesty's justices
of the peace for the said county, that
C. D., on, &c. at, &c. did, &c. [*here set
out the complaint and information verba-
tim*] contrary to the statute in that case
made and provided, and the said C. D.
hath also been charged with the said
offence by and upon the oath of a cre-
dible witness: And whereas, I am fur-
ther informed that you L. M., of —,
in the said county, yeoman, are a ma-
terial witness to be examined according
to law, concerning the said supposed of-

fence: These are therefore to require
you the said L. M. personally to be and
appear before me [*or before two of His
Majesty's justices of the peace for the
said county*], at the house of —, at
—, in the said county, on —, the
— day of — next, at the hour of
—, in the — noon of the same
day, to testify your knowledge of and
concerning the matters alleged in and
relating to the said complaint and infor-
mation. Herein fail you not. Given under
my hand and seal, the — day of —,
A. D. 1834.

G. H. (L. S.)

(h) *Ante*, 175.

the taking down of the evidence; the competency of witnesses and admissibility of evidence; the evidence on the part of the complainant in particular; and then the defence and evidence of the defendant; and the justices' right to adjourn their final determination.

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

The jurisdiction of one or more justices, has already been considered, in enquiring before whom an *information* may be laid; and we have seen that a general jurisdiction has been given to *one* justice to receive the information, take the oath of an offence having been committed, issue the summons and warrant to apprehend or to search, although the ultimate *hearing* of the charge must be before *two justices*. (i) Cases of *common assault and battery*, must by the 9 Geo. 4, c. 31, be *determined* by *two* justices; in cases of *petty stealings*, not constituting indictable larceny at common law, and also of wilful or malicious injuries to property *not* indictable, the 7 & 8 Geo. 4, c. 29, and c. 30, give jurisdiction to *one* justice to hear and determine, excepting in some cases of prosecution for *second or subsequent offences*, when as the penalty or punishment is more considerable, frequently the adjudication of *two* justices is required by the express terms of those acts. (k) These are only a few instances; in each case that may occur, the *particular statute* must be consulted.

Jurisdiction
and number of
justices.

But even in cases where jurisdiction is given to *one* justice to convict, it would be an unwise exercise of power to act separately, unless upon the very clearest and most indisputable charge; and it is most judicious, especially in the country, in order to avoid local prejudice, always to obtain the hearing and conviction by *two* justices acting *together*. Derogatory instances of irregularity, if not of gross injustice, so detrimental to the respect really due in general to magistrates, would probably be thus avoided. *Two* justices acting together would rarely venture to be guilty of those excesses and abuses of power, which in modern time are sometimes exhibited by *one* magistrate when acting singly. We are here, however, to confine our attention *to the law*.

We have seen that the hearing must be before the *proper* justices, as directed by the statute on which the proceeding is founded; and where an act directs, that a party charged shall

(i) *Ante*, 154.

(k) *Ante*, 152 to 155, and 175.

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

be taken before justices residing *next to the place* where the party shall be taken or arrested, the conviction must show that they so resided, or otherwise specify the particular circumstance under which the convicting justice had jurisdiction. (l)

Of the non-attendance of the defendant, and proof of the due service of the summons.

If at the appointed time and place the defendant do not appear, then the justice or justices should upon oath examine the constable or person to whom the summons was delivered to be served, respecting the time, place, and circumstances of the service, and before any proceeding *ex parte*, should be well satisfied that there has been a regular service, according to the requisites of the particular statute, or an actual personal service upon the defendant himself, a reasonable time before the appointed hour; and if there should be any doubt in this respect, or any apprehension that mistake or accident has occasioned the non-attendance, then the prudent course will be to adjourn, and appoint another day for the hearing, and to issue a fresh summons accordingly, apprising the complainant and his witnesses of the adjournment.

But if the magistrate be satisfied that there was a sufficient service, and that the defendant wilfully neglects to appear, he may then proceed *ex parte*, taking care to observe with even greater care, all regularity in the proceedings, as presently suggested, especially as regards the taking down of the evidence; and it will be as well to caution the informer, that if his information should turn out defective, then as the defendant has not appeared, the defect will not be aided by the 3 Geo. 4, c. 23, and the whole proceeding be futile. At all events, the justice must observe the same course of proceeding as if the defendant had appeared. (m)

Of confessions.

If the defendant appear and confess the charge without qualification, he thereby dispenses with the necessity for the complainant adducing any evidence; and this is considered as equivalent to the strongest proof, and suffices even in cases where a particular statute may have required "the oath of one or two credible witnesses;" and it has been even held, that proof of a confession made to another person, and not before the justice, suffices; but the better opinion is, that the confession must be made in open Court, and before the convicting magistrate. (n)

(l) *Ex parte Kale*, 10 Bar. & C. 101; 489; 10 Mod. 381; Paley Conv. 26.
 2 Dowl. & R. 212; *ante*, 152 to 155.

(m) *R. v. Warnford*, 5 Dowl. & Ry.

(n) *Semble*, 2 East's R. 131; Foster's Crown L. 240.

A confession, however, will not (unless perhaps under the 3 Geo. 4, c. 23) aid a substantial defect in the information. (o) CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

Of Adjournments.—If the party charged appear in person, or by attorney or friend, and state adequate excuse for not being then ready to proceed to investigate the charge, the justice must exercise a liberal discretion, and not prejudicially press immediate proceedings, and he should *adjourn* the hearing, (p) taking care first to ascertain whether the particular statute requires a conviction within a limited time nearly elapsed. (q) Adjournments.

Reading the Information to the Defendant.—The defendant has a right in the first instance to have the complaint deliberately read to him, when the statute required it to be, or it really has been *in writing*; and if not, then at least the *substance* of the charge must be stated. (r) Reading the
information to
the defendant,
and his objec-
tions there-
upon.

If the information upon which the summons was founded was defective, the party charged with the offence may, upon the *hearing*, in the first instance, object to its validity; and if the objection be well founded, the magistrate should immediately dismiss the information; and if not, he would proceed at his peril: and if a justice should in his conviction, without the defendant's express concurrence, recite a supposed valid information differing from that which had really been exhibited, and upon which the party had been summoned, the Court of King's Bench would compel him to return the *real information*, upon a proper notice of motion, *mandamus* and *certiorari*, and the magistrate would be at least censured; (s) and certainly any conviction for an offence not charged in the information would be invalid. (t)

The defendant has a right to insist that the hearing shall be entirely confined to the terms of the charge stated in the original information or summons; and if the latter be defective, he has a right to insist on a fresh summons, stating the real and also a sufficient charge. (u) Upon a valid objection, the informer might abandon the charge and prefer one more final; and therefore when the objection is of substance and would not be aided by a conviction under the 3 Geo. 4, c. 23, then the prudent

(o) *R. v. Settle*, 1 Burr. 505.

(p) *R. v. Stone*, 1 East, 469.

(q) *R. v. Folley*, 3 East, 467; *R. v. Bellamy*, 1 B. & Cres. 500; *R. v. Barratt*, 1 Salk. 363.

(r) 2 T. R. 23.

(s) *Semble, R. v. Peace*, 9 East, 358.

(t) *Rogers v. Jones*, 3 B. & Cres. 409; 5 Dowl. & Ry. 268; *R. v. Soper*, 3 B. & Cres. 857; 5 Dowl. & R. 669.

(u) *Id. ibid.*

CHAP. IV. course may be for the defendant not to disclose his objection until it is too late to commence a fresh proceeding.

Right to appear by counsel or attorney, and have their private assistance.

Attendance of Counsel, Attorney, or Friend.—Upon preliminary examinations upon charges of *indictable felonies or misdemeanors*, it might impede the course of justice to allow counsel or an attorney to attend and make objections; and therefore though their assistance is sometimes allowed, it is *not of right*; and though formerly doubted, it is now settled, that the defendant has in all cases of summary proceedings which are to be heard and *decided* by one or more justices, a *perfect legal right* to have the *attendance and private assistance* of counsel or an attorney.^(v) In a subsequent case, the Court of King's Bench limited the right (without *permission* of the justice) to mere attendance and *private assistance or advice, and taking notes*; but held that neither the informer nor the defendant has a right to have the assistance of counsel or an attorney *to interfere as an advocate for either party, either in examining or cross-examining witnesses, or in arguing technical or other objections*, at the risk of embarrassing the justices, though each or a friend may take notes.^(w) Whether this restriction, so

(v) *Daubeny v. Cooper*, 10 Bar. & Cres. 237, A. D. 1829, K. B. In *Collier v. Hicks*, 7 January, 1831, held in K. B. that an attorney has a right to be present, and advise and assist his client; but that a justice may refuse to permit him to act as a counsel; *i. e.* making speeches; see a sensible note in Dowling's edition of Paley on Convictions; and see cases of felony and other indictable charges; *R. v. Coleridge*, 1 B. & C. 37; and 2 Dowl. & R. 86, S. C.

(w) See *Collier v. Hicks and others*, 2 B. & Adolph. 663. The following is a MS. report of that case, containing the principal points. This was an action by an attorney at Cheltenham against Sir W. Hicks, and another magistrate of that town, and two of their officers, for expelling the plaintiff from their justice-room. The case came on upon a demurrer to two special pleas of justification. The facts were these:—In December, 1829, an information was laid before the magistrates at Cheltenham by one Latham, against the proprietors of a stage-coach, for not having a plate with a number upon the coach. On the hearing of the information, the plaintiff, Mr. Collier, appeared, and proposed to act as an advocate, in taking notes and conducting the proceedings on the part of the informer, but the magistrates refused to let him act in that character, and on

his persisting in his attempt to do so, he was removed from the justice-room. The question now for the decision of the Court was, whether the plaintiff had a right to be present at the hearing of the information before the magistrates, as the attorney of the informer, and to take notes of the evidence.

Mr. *Godson*, for the plaintiff, relied principally on the case of "*Daubeny v. Cooper*," which decided that an attorney had a right to be present on the hearing of an information before a magistrate, as one of the public. He argued that the magistrates were acting, on this occasion, in a judicial capacity, as they were bound to hear and determine, and that their room, therefore, was an open court, where any one had a right to be present to hear what was passing, and could not legally be expelled, unless for interrupting the proceedings, or otherwise conducting himself improperly. The question was, whether magistrates could prevent not only attorneys, but counsel, or any other person, from acting as advocates on the hearing of an information under a penal statute. He contended that they could not. Any one had a right to be present as an attorney or advocate, or to take notes of what was passing.

Mr. *Justice*, for the defendants, was stopped by

crippling the assistance of professional men, in cases where sometimes very intricate questions of law requiring legal discussion and decision should continue, is a subject fit for the Legislature to consider, but is foreign to our present limited inquiry.

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

It has been recently holden, that the proceedings against a party in a summary manner, under the 5 Ann, c. 14, for keeping and using a gun to destroy game, was of a *judicial nature*, at which all persons have a *prima facie* right to be present; and therefore where a magistrate had, without any specific reason, caused a party who claimed a right to be present to be removed from a justice-room where such a proceeding was going on, it was held that he was liable to an action of trespass. (x) But the justices have a right so far to regulate their proceedings as to prohibit *the taking of notes of the evidence*, excepting on the part of the *informer* or the *defendant*; and if persisted in after notice, they may cause the party to be turned out of the room where the hearing is had. (y)

Right of third person uninterested to be present, but not to take notes.

Lord Tenterden, who said the Court was of opinion that the pleas amounted to a justification in law, and therefore the judgment must be for the defendants.

Their Lordships then proceeded to deliver their opinions *seriatim* at considerable length. The substance of their judgment was, that the magistrates had a discretion in common with other courts of justice, in regulating their proceedings or determining who should be heard before them in the character of an advocate. The pleadings in this case did not raise the question as to the right of any person merely to take notes, but the plaintiff put it on the ground that he had a right to act as an advocate in *arguing or expounding the law, and examining or cross-examining witnesses*; and it had been *very properly* said, that if the magistrates could exclude an attorney, they had also the power to prevent a barrister or any one of the public from acting as an advocate. The Court was of opinion that the magistrates had that power, although frequently, in the exercise of their discretion, they allowed members of either branch of the profession to conduct cases where the accuser or the defendant required legal assistance. The Superior Courts of Westminster-hall had the power, and were bound, according to ancient usage, not to allow any persons to plead before them but barristers who were members of one of the Inns of Court; and in the Court of Common Pleas, none but barristers

who had attained the dignity of serjeant were allowed to practise. It might be proper that either party should have the *advice and assistance* of a counsel or attorney in some cases; but it did not follow that it was desirable in all cases, for it must necessarily lead to expense, as the other party must be provided with the same assistance to be on equal terms with his adversary. It might also be doubted whether such a practice was favorable to the due administration of justice; for members of either branch of the profession, in discussions before magistrates, might urge *technical objections*, quite beside the justice of the case, which must have the effect of *embarrassing* persons not accustomed to such subtleties. In the case of "*Daubeny v. Cooper*," and other cases, it was decided that all the King's subjects had a right to be present in an open court, so that there was room, and they conducted themselves with decorum; but those cases did not bear upon the present question, which was, whether magistrates had the power to decide who should appear before them as advocates; and the Court being of opinion that the magistrates had that power, the assault in excluding the plaintiff from the police-office was justified.—Judgment for the defendants.

(x) *Daubeny v. Cooper*, 10 B. & Cres. 237.

(y) *Collier v. Hicks*, 2 B. & Adolp. 663; and see as to coroners, *Garnett v. Ferrand*, 6 Bar. & Cres. 611.

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

The evidence
and witnesses.

In general, the particular act creating the offence or making it punishable by summary proceeding, contains some express directions about the witnesses and evidence; as that the party aggrieved shall be competent to be a witness in support of the charge, but then that he shall not receive more than the costs of the proceeding; (z) or that inhabitants of the parish or district, although to be remotely benefited in an almost imperceptible degree by the penalty being applicable in aid of the county rate. When the statute is silent, the admissibility of the evidence will be governed by *general principles* and rules, the statement of which would be beyond the limits of this work. As a *general rule*, however, it is to be kept in view, that whenever the *complainant or informer* would derive any *direct* benefit from a conviction, his interest precludes him from giving evidence in support of the proceeding, (a) unless it be expressly otherwise directed; and this is one reason why it has been decided that convictions should state the names of the witnesses, so that it may appear that the informer was not one of them. (b) But the small advantage to a witness as the *inhabitant of a parish*, to whom a penalty is given, does not now constitute any objection to his evidence; (c) and all the late acts, we have seen, render the inhabitant of a county admissible as a witness, though the penalty is to be paid in aid of the county rate. (d)

Oath of wit-
ness.

The *same oath* should be administered to each witness as on the trial of an action; and it is established that in support of a summary charge all the evidence must be *on oath* (e) duly administered, and in the presence and hearing of the defendant, if he appear; and if the justice proceed otherwise, he will be liable to a criminal information. (f)

It is clear that a justice of the peace has not jurisdiction to commit a person for contemptuously *refusing to take* an oath and *give evidence* touching a charge of an offence not indictable, if even he could do so upon a charge of riot; and where a party was committed by a justice "for refusing to give evidence before him touching a certain riot and disturbance," without showing that there had been a *person charged* before the justices, and that the witness was apprised of the existence of such charge, with respect to which he was required to be examined

(z) 7 & 8 G. 4, c. 29. s. 66; id. ch. 30.
s. 29; 1 & 2 W. 4, c. 32.

(a) *R. v. Gubbald*, Gilb. Cases, 111;
R. v. Drake, 2 Show. 476.

(b) *R. v. Gubbald*, Gilb. 111; *Rex v.*
Drake, 2 Show. 476.

(c) 27 Geo. 3, c. 29; *Rex v. Davis*,

6 T. R. 177.

(d) 9 G. 4, c. 31; 7 & 8 Geo. 4, c. 29;
id. ch. 30; and 1 & 2 W. 4, c. 32.

(e) *R. v. Cordler*, 4 Burr. 2279.

(f) *R. v. Vissont*, 2 Burr. 1163; *R.*
v. Constable, 7 Dowl. & Ry. 663; *R.*
v. Crowther, 1 Term R. 125.

as a witness, it was held that the warrant of commitment was no justification of the magistrate in an action of trespass. (h)

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

When the conviction states, as it should do, the names of the witnesses, and that they were sworn before the justice, it will be inferred that they were duly sworn. (i)

A magistrate cannot be required to hear evidence which ought not to affect his determination. (k) But if he should incorrectly refuse to hear a competent witness for the defendant, his subsequent conviction may be removed by *certiorari*, and quashed. (l)

The examination of witnesses, as indeed all the proceedings, should be conducted as nearly as practicable the same as in the superior Courts; and the rule there observed that *leading questions* shall not be put to a witness, so as to suggest favourable and probably incorrect answers, so accords with justice, that it should be observed before magistrates with the utmost strictness. Justices, however, should be particularly cautious not to be led from the *full* investigation of truth by too strict an adherence to the rules of evidence, with which they may have become informed by a legal education or particular study, at least when probably the observance of those rules would prevent them from attaining full information upon every subject; the more especially as those rules have of late been much qualified, as will be found in the subsequent chapter upon evidence. Thus it has been a supposed rule, that a party cannot contradict his own witness; and yet it has been lately decided, that if a witness gave evidence against the interest of the party who called him, such party may now nevertheless bring other witnesses, not indeed merely to *discredit him generally*, but to contradict him on the fact he has deposed, if it be material to the matter under investigation, though not so if it be merely collateral. (m) The same decision would authorize an informer or defendant to call successive witnesses to establish a fact, although a witness previously called by him had unexpectedly sworn the contrary. (m)

Mode of exa-
mination, &c.

However irksome it may be, it is nevertheless *the duty* of magistrates, as well at common law as under the 3 Geo. 4, c. 23, upon all summary proceedings, whether for penalties incurred under the preceding acts or for any other penalty, or in any case where the proceeding may terminate in a conviction, to cause his clerk to take down the evidence *verbatim* in the *language of the witnesses*, not perhaps *all* the exact words, but the

Mode in which
the evidence
must be taken
down.

(h) *Cropper v. Horton*, 4 Dowl. & Ry. Mag. Cases, 42.

(i) *R. v. Seaway*, 2 Chitty's R. 522; *R. v. Picton*, 2 East, 195; *R. v. Glossop*, 4 B. & Ald. 616.

(k) *R. v. Minshul*, 2 Nev. & Man. Rep. 277.

(l) *R. v. —*, 2 Chitty's R. 137.

(m) *Friedland v. London Assurance Company*, 4 B. & Adolph. 193.

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

whole of the very words that are material, and these not in the terms of the statute, but in the natural and actual expressions of each witness; (*m*) and the difficulty of so doing is no excuse for the omission. (*n*) It is recommended that the questions and answers be taken down precisely in the words and tense in which they are uttered, and that in cases of importance the evidence be immediately afterwards read over by the magistrate to the witness, and he be asked whether he has any thing to add or explain or qualify.

It has repeatedly been held, that justices should not allow depositions to be framed in the words of a statute under which the party is charged or committed, but as nearly as may be in the very words used by the witness; (*o*) and it is very irregular to take down the examination of a witness before he has been sworn, and afterwards to swear him to the truth of the statement; for the testimony at the very time it is given should be under the influence of the oath, and in the presence of the defendant, who may put questions to the witness altering the effect of his first statement. (*p*)

When the statute upon which the proceeding is founded does not prescribe another form of conviction, the general act, 3 Geo. 4, c. 23, applies, and then *expressly* requires the justice to state in the conviction "*the evidence, and as nearly as possible in the words used by the witness, and if more than one witness be examined, then the evidence given by each;*" and if the magistrate should neglect to frame his conviction accordingly, he may be compelled to comply by *mandamus*; (*q*) so that the proper course is for the justice to take down all the questions as well as the answers of the witnesses, in the very words used by them, and in the form that was adopted before commissioners of bankrupt. (*r*) And if a statute state that if a party be convicted upon the oath of a credible witness, he shall be punished in a prescribed manner, it is not sufficient for the conviction to state that the party was convicted of the offence, but it must *expressly* state that he was so convicted "on the oath of a credible witness." (*s*)

In general, the evidence must state the facts upon which the conviction is afterwards founded, and not merely the result; and

(*m*) *R. v. Marsh*, 2 B. & Cres. 717; and 4 Dowl. & R. 260, S. C.

(*n*) *Id. ibid.*

(*o*) *Ante*, 165, 172, 3; *Miles v. Gollett*, 2 Man. & Ry. Mag. Cas. 262; *In re Rix*, 2 Dowl. & R. Mag. Cases. 251; *Cohen v. Morgan*, 6 Dowl. & R. 9.

(*p*) *R. v. Kiddy*, 4 Dowl. & Ry. 734;

R. v. Hall, 1 T. R. 320; 2 Burr. 1163.

(*q*) *R. v. Marsh*, 2 B. & Cres. 717; 4 D. & R. 264, S. C.; and *In matter Rix*, *id.* 352; *R. v. Warnford*, 5 Dowl. & Ry. 489.

(*r*) See also *ante*, 172, 3.

(*s*) *Ex parte Aldridge*, 2 B. & Cres. 600; 4 Dowl. & Ry. 83, S. C.

therefore where a conviction on 45 Geo. 3, c. 121, s. 7, for carrying and conveying foreign brandy in half ankers, merely alleged to be "then and there liable to forfeiture," the said offence being committed against the provisions of the acts for the prevention of smuggling, this was held insufficient, for not showing the *particular grounds* of forfeiture; (t) and if a justice perversely and wilfully state the evidence in terms different in substance from that which was really given, he may be proceeded against by criminal information. (u)

The circumstance of the evidence varying in time or place from the information, we have seen, will not in general be material; and if in other respects it suffice, the justice should convict. (v)

In the case of a *criminal* charge, it has been laid down that if a prisoner be brought before a magistrate, *his statement* of the facts ought not to be taken till the evidence against him has been gone through, and he should be then asked if he has any thing to say in answer to the charge, (w) and be cautioned that if he make any statement, it may be used against him, and that he must not expect any favour if he confess; (x) and Mr. Baron Garrow censured the practice of taking a statement from a prisoner, who should only be asked if he wish to say any thing in answer to the charge, when he had heard all that the witnesses in support of it had to say against him; but at the same time a magistrate need not *dissuade* him against confessing. (y) Perhaps these suggestions should also be observed in cases even of summary proceedings.

The defence.

With respect to the *defendant's evidence*, although we have seen that sometimes the *information* must negative that the defendant was protected or privileged by any exemption in the enacting clause, yet it has frequently been decided that the informer need not adduce any negative evidence; (z) and the late *Game Act*, 1 & 2 W. 4, c. 32, expressly enacts that the defendant shall prove a licence or exemption, &c. (a)

Evidence in support of defence.

Independently of a denial of the facts charged at *common law*, and also expressly so under the recent acts, if the defendant

Defence under *bond fide* claim of right.

(t) *Ex parte Smith*, 3 D. & Ry. 461.
(u) *R. v. Pearce*, 9 East, R. 358.
(v) *Ante*, 162, 3; Bunb. 223, 262.
(w) *R. v. Fagg*, 2 Man. & Ry. Mag. Cases, 517.

(x) *R. v. Green*, 5 Car. & Pa. 312.
(y) See note (w) *supra*.
(z) *R. v. Turner*, 5 M. & S. 206; *R. v. Neville*, 1 B. & Adolph. 429.
(a) Sect. 42.

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

make it appear, by cross-examination of the complainant's witnesses or by his own, that there was a *bonâ fide* claim of right, in asserting which the act was committed, then a justice or justices ought not to proceed, but should dismiss the complaint and leave the complainant to try the question in an action. (c) But the claim must not be merely *colourable*, but made under circumstances inducing at least a reasonable ground for supposing that it may be established; (d) and cases of this nature are, as we have seen, provided for by the three recent acts. (e)

Postponing the decision of the justices, and presence of all the justices together at the time of deciding.

Although there is not, it is believed, any express decision on the subject, it should seem that after the evidence on both sides has been closed, a justice or justices may take time to consider of his decision. (f) But then if two justices must convict, they should be present together when they do resolve upon the conviction, so that the parties may have the benefit of their compared, considered, and discussed judgments and decision; and it will be proper for the justices to give the complainant and the defendant reasonable notice of the intended time and place when the justices will decide, so that they may be present if they should think fit, and hear their verbal judgment, and receive a copy of their conviction if they should so decide.

In deciding, they are the sole judges of the weight of the evidence; and when the conviction is set out, if upon the face of their conviction, there be the least evidence that upon the trial of an action might have been left to a jury, then however slight, the Court of King's Bench will not interfere with their conviction, though perhaps they themselves might have drawn a different conclusion; as where upon an information under the then game laws, it was merely proved that the defendant walked across a field out of a footpath, as if in pursuit of game, or levelled his gun at game; (g) and on the other hand, if a magistrate should dismiss a charge after hearing evidence that might have justified a conviction, the Court also will refuse to interfere; (h) for only the justices are to judge of the degree of credit to be extended to each witness, and are not to be influenced alone by the exact words that may have been sworn. (i) The charge being of a criminal nature, all the rules relating to

(c) *Kinnersley v. Orpe*, Dougl. 500; *Hunt v. Andrews*, 3 Bar. & Ald. 341.

(d) *Id. ibid.*

(e) 7 & 8 Geo. 4, c. 29; *id.* ch. 30; and 1 & 2 W. 4, c. 32.

(f) *Semble*, Lord Raym. 1514; 1 Salk. 352; 1 East, 486.

(g) *R. v. Davis*, 6 T. R. 178; *R. v. Reason*, 6 T. R. 376; *R. v. Smith*, 8 Term R. 590; *R. v. Ridgway*, 5 B. & Ald. 127; 1 Dowl. & R. 132; *Palcy Conv.* 53.

(h) *Id. ibid.*

(i) *Id. ibid.*

such imputations apply, and if there be the least doubt in the mind of the justice, the defendant ought to have the benefit, and be acquitted.

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

It is principally at this stage of summary proceedings, though it may be before, that by the recommendation of the hearing justice or justices, *amicable adjustments* or *compromises* take place; and the effecting of these is one of the most enviable departments of a country gentleman, invested with the office of a magistrate, so preferable to that of the character of a *committing* or a *convicting* justice. We sometimes see the calendar crowded with a detail of numerous commitments by a particular justice, who plumes himself on his *activity* in sending to trial numerous prisoners, who are as frequently acquitted; and although previously only suspicious characters, have during the imprisonment become confirmed felons. A justice of this description will seldom be a *pacificator* amongst neighbours, but will hastily, without examination, as in a recent instance, commit or convict without scarcely any enquiry. (i) Under the recent acts which, as affording remedies for small *private* injuries, are now principally under our consideration, a justice has express power, even *after* conviction of the specified petty injuries, “to discharge the offender from his conviction, upon his making such satisfaction to the party aggrieved for damages and costs, or either of them, as shall be ascertained by the justice;” and this, although the penalty on conviction would have been applicable in aid of the county rate; (k) and independently of express enactment, informations for offences of a *private* nature not amounting to felony, nor to indictable misdemeanor, may, it should seem, be compromised by leave of the justices before whom the charge is preferred.

Of amicable adjustments and compromises, by the intervention of justices.

The 18 Eliz. c. 5, s. 4, as to the *offence of compounding*, only applies to the superior Courts, and not to offences *cognizable only* before justices in their summary jurisdiction, and therefore an indictment for compounding such an offence was holden bad in arrest of judgment. (l) But in *Gotley's case* it was held indictable to compromise a charge under the then Highway Act, subjecting a party to a penalty, which might have been proceeded for in the superior Courts even before any action or proceeding had been commenced. (m) The statute 18 Eliz. extends to *penal*

(i) *R. v. Constable*, 7 Dowl. & R. 663.

282.

(k) 7 & 8 Geo. 4, c. 29, s. 68; id. c. 30, s. 34, in the same words.

(m) *Gotley's case*, Russ. & R. Crown Cases, 84.

(l) *R. v. Crisp and others*, 1 B. & Ald.

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

actions, although the whole of the penalty be given to the informer, (n) but not to cases of penalties given to a *party aggrieved*. (o) It seems clear, that pending proceedings on the 7 & 8 Geo. 4, c. 29, s. 30, for petty takings, or injuries not indictable, when the value or damages might be paid to the complainant, he might, at any instant before conviction, compound the charge.

In cases where opportunity occurs for effecting an *amicable adjustment*, especially between neighbours, it would obviously tend to the *future preservation of the peace*, if the magistrate would advise the parties, by their own *agreement*, to settle the difference upon just terms, and thereby prevent a formal adjudication, the precise purport of which he may decline to communicate to either party, and thus probably prevent any exultation or vindictive feeling, frequently incident to a formal decision in favour of either party, and thus also probably occasion even a permanent reconciliation. (p) In order to enforce any agreement that the parties may make, the justices may adjourn or suspend their formal decision, so as to afford the parties an opportunity of making complete satisfaction; and if they should not, they might afterwards draw up their formal acquittal, dismissal, or conviction, according to the evidence.

Decision of the
Justices.

1. Acquittal
and record, or
certificate
thereof.

If the justices should be of opinion that the evidence does not clearly and certainly establish that the offence was committed as charged in the *information*, they ought to acquit; and the form of such acquittal, after reciting the information and appearance and the hearing, may be as in the note; (q) and in

(n) 4 Bla. C. 136, note 3.

(o) 1 Salk. 30; 2 Hawk. 279.

(p) It will be observed that this was the principle upon which the *reconciliation* clauses in the Local Jurisdiction act were proposed to be enacted into law; but they would have been inefficient for want of power of the *same* judge *immediately* to decide the matter for or against the party refusing to abide by his recommendation.

(q) *R. v. Pack*, 6 Term Rep. 375.

Form of ac-
quittal by jus-
tices.

County } [After setting forth the in-
of — } formation and plea as usual,
proceed thus] “On the day and year
aforesaid, at — in the county of
— one witness, *W. D.*, of — in the
county of — cometh before us the
justices aforesaid, and before us the said
justices, upon his oath, deposeth and
saith, in the presence of the said *J. K.*,
that on the — day of — in the
year of our Lord — he the said *W.*

D., by the order of the said *J. K.*, threw half a pound weight of brimstone upon the charcoal fire, which was then using for the purpose of drying one hundred weight of hops of the said *J. K.* in a certain hop oast, &c., which brimstone was so put upon the said fire for the purpose of making the said hops have a better colour, and that he the said *W. D.* verily believed that in consequence thereof the said hops did acquire a better colour by the fumes of the said brimstone mixing with the said hops, but because the [informer, *W. S.*,] does not produce any other evidence before us, the said justices, against the said *J. K.*, and because all and singular the premises being heard and fully understood by us the said justices, it manifestly appears to us that the said *J. K.* ought not to be convicted of the premises above laid to his charge in and by the said information of the said *W. S.*,

general *an acquittal*, though erroneous, would be conclusive, (r) though it might be otherwise if the ground of acquittal were merely the want of jurisdiction, in which case indeed it is obvious that the decision would rather be a *dismissal* of the complaint than an acquittal on the merits. (s) Some of the older statutes (t) and the recent Game Act, 1 & 2 W. 4, c. 32, s. 46, enact that when *proceedings* have been *instituted* by or with the concurrence or assent of the party aggrieved, the result, whether acquittal or conviction, shall be a bar to any action of trespass or other proceeding; and it would be advisable for the defendant, in general, to have a formal record of the proceeding. Other acts, as the Larceny Act, 7 & 8 Geo. 4, c. 29, s. 70, and the Wilful and Malicious Injury Act, *id.* c. 30, s. 36, in terms only declare that a conviction, when satisfied or pardoned, shall be a bar, without giving any effect to an *acquittal*.

The 9 Geo. 4, c. 31, s. 27, we have seen, enacts, that if the two justices shall deem the offence not proved, or that the *assault or battery* has been justifiable, or so trifling as not to *merit* punishment, then they may *dismiss the complaint*; and in that case they are forthwith to make out a *certificate* under their hands, stating the fact of such dismissal, (u) and shall deliver such certificate to the party against whom the complaint was preferred; and such certificate, or a conviction, shall be a bar to any other proceeding. (v) In other cases of acquittal it may be advisable, although not usual, for the defendant to endeavour at the time to obtain the justice's formal statement of the acquittal; and which, excepting merely in stating that result, may be similar to the prescribed form of conviction, in the 3 Geo. 4, c. 23, and in substance as in the subscribed form.

2. Certificate
of dismissal
under 9 G. 4,
c. 31. s. 27, 28.

The document called a *Conviction*, is rather a formal *recital* 2. Convictions.

or of any part thereof; therefore it is considered by us the said justices that he be acquitted of the premises above laid to his charge in and by the said information of the said W. S., and he is thereof acquitted by us the said justices accordingly. Given under our hands and seals this — day of — in the year of our Lord —

(L. s.)
(L. s.)

(r) *R. v. Pack*, 6 T. R. 375.

(s) *Semble*, 1 Chitty's Crim. L. 2d edit. 458, 9.

(t) 8 Geo. 1, c. 12, s. 2; and *R. v. Midlam*, 3 Burr. 1720.

(u) See form, *infra* next note.

(v) The following may be the form

of certificate.

Hertfordshire } We, two of His Majesty's Justices of the Peace for the county of —, do hereby certify, that on the — day of —, in the year of our Lord —, at [] in the said county of Hertford, C. D. of the parish of —, in the said county, appeared before us the said Justices, charged with having unlawfully assaulted and beaten A. B. on the — day of —, at the parish of —, in the said county, and that we the said Justices dismissed the said complaint upon the hearing thereof. Given under our hands and seals this — day of —, A. D. 1834. G. H. (L. s.) I. K. (L. s.)

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

Time of draw-
ing up and de-
livering, or
returning the
same to Ses-
sions.

of the antecedent proceedings, to show that all have been regular, and of the *decision* of the justice or justices, than the decision itself, which is usually pronounced verbally; and at most only *minutes* or *memoranda* are made by the justice or his clerk at the time of his declaring his decision, and which are afterwards (in case the penalty is not paid), with *due expedition* to be drawn up in the full form of a conviction; and the convenience of justices in this respect has been so much consulted, that it has even been decided, that if incautiously an informal conviction has been drawn up, and signed and delivered over to the party convicted, and even actually enforced by distress or imprisonment; yet that afterwards, and at any time before his return to a writ of certiorari, or before the trial of an action of trespass against the justice for his commitment or levy, he may draw up a more formal conviction, provided it correspond with the actual proceeding and evidence before the justice; and he may produce the same, as if it had been *originally* the correct conviction, and thereby establish a complete defence to such action; (*w*) unless the process subsequent to the time of the conviction should betray or disclose, that it was not truly founded on a sufficient conviction. (*x*)

It is however exceedingly imprudent for any magistrate to make any statement, and still more so to deliver any written document as the result of his decision, before he has with due care, and strictly according with the evidence before him, completed his formal conviction; and if in his conviction he should falsely recite any fact, or mistake the evidence, or omit any thing material, he may by mandamus be compelled, with some degree of discredit, and perhaps costs, fully and correctly to state the facts and evidence; and if he were wilfully to mistake the evidence, he might be prosecuted for the misdemeanor. (*y*)

Indeed there is no part of magisterial duty more difficult or delicate, than in that of properly framing his conviction.

We have said that formal convictions should be completed with *due expedition*; and this is requisite at common law; for it is incumbent on justices, within a reasonable time, *gratuitously* to deliver to the party convicted, a copy on paper of his con-

(*w*) *R. v. Barker*, 1 East, 182; *Still v. Wells*, 7 East, 553; *Massey v. Johnson*, 12 East, 32; *Bridget v. Corney*, 1 M. and R.; Mag. Cases, 1; see also *R. v. Huntington*, 5 Dowl. & R. 583; *Fawcett v. Fowles*, 7 B. & Cres. 394.

(*x*) *R. v. Harper*, 1 Dowl. & R. 214.

(*y*) *Ex parte Rix*, and *Ex parte Marsh*, 2 Bar. & Cres. 717; 4 Dowl. & Ry. 264. 352; 2 Dowl. & R. Mag. Cases, 251; *R. v. Barker*, 1 East R. 182.

viction, in order that he may determine whether he will appeal when that remedy is allowed, or whether he will endeavour to obtain a writ of certiorari. (z) It has been said, however, that a defendant is not entitled, *as of right*, to have a copy of a conviction, to enable him to appeal against it at the sessions for any matter of *mere form*, or to pick holes in it without regard to the merits; (a) but that doctrine may be questionable, especially as defects in mere matter of form are now cured. (b) The conviction on parchment should also be returned to the Clerk of the Peace at session, not only in cases where a convicted party may appeal, but in all other cases; in order that the Crown or some public fund, now in general the *county rate*, may not be deprived of penalties given to them in numerous cases. (c) The 7 & 8 Geo. 4, c. 29, s. 74, and 7 & 8 Geo. 4, c. 30, s. 40, in express terms, require convictions under those acts to be transmitted to *the next* Court of General or Quarter Sessions. And if by a justice's neglect to return his conviction in due time, a party should be deprived of his appeal, an action might be supported against him for the damage occasioned by his neglect. (d)

As respects the *form* of convictions, difficulties can rarely occur since the 3 Geo. 4, c. 23, intituled, "An Act to facilitate summary Proceedings before Justices of the Peace and others," unless a magistrate should, to use the figure of Sir William Blackstone, like an owl, wilfully shut his eyes against the light; (e) for that act directs that "in all cases wherein a conviction shall have taken place, and no particular form for the record thereof hath been directed, the justice or justices, deputy lieutenant or other person duly authorized to proceed summarily therein, and before whom the offender or offenders shall have been convicted, *shall* and *may* cause the record of such conviction to be drawn up in the manner and form following, or in any words *to the same effect, mutatis mutandis*, that is to say," and then the form of the conviction is enacted, and which is subscribed. (f)

Formal parts,
and requisites
of convictions.

(z) *R. v. Midlam*, 3 Burr. 1720.

(a) *R. v. Huntingdon*, 5 Dow. & Ry. 588; 2 Dow. & Ry. Mag. Cas. 594.

(b) 3 Geo. 4, c. 23; and see as to the right to a copy of a record in Superior Courts, *Brown v. Cumming*, 10 Bar. & Cres. 70.

(c) *R. v. Eaton*, 2 Term R. 285.

(d) *R. v. Midlam*, 3 Burr. 1720.

(e) In *Scott v. Sheppard*, 3 Wils. R. 410.

(f) County (*or as the case may be*) of — } Be it remembered, that on the — day of —, in the year of our Lord —, at —, in the county of —, A. B. of —, in the county of —, labourer (*or as the case may be*), personally came before me [*or before us, &c.*] C. D. one [*or more, as the case may be*] of His Majesty's Justices of the Peace for the said —, and informed

Form of conviction prescribed by 3 G. 4, c. 23. s. 1.

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

In what res-
pects impera-
tive, and con-
sequences of
deviation.

Recital of in-
formation.

It will be observed, that the words "*shall and may*," at least as regards the direction to *set out the evidence as nearly as possible in the words used by the witness*, are imperative; and if not observed, either the informer or defendant may, by motion to the Court of King's Bench for a writ of *mandamus*, compel the justice to *reform* his conviction by setting forth at least the substance, although not perhaps *every* word; (g) but as the act is by its title to *facilitate* (and not embarrass) summary proceedings, it would seem that independently of the subsequent clause aiding defects *in form*, a conviction deviating in form from that prescribed would not be invalid, nor would be quashed on *that* account. The act expressly excepts forms of conviction specially directed by any particular act; and we have seen that each of the four recent acts relating to summary proceedings, as indeed do almost all modern statutes, direct specific forms very nearly resembling each other, and that in 3 Geo. 4, c. 23. (h) As the rules at *common law* may still apply in some cases, and explain and assist, we will concisely state them.

A conviction, being a record of all the proceedings, so that the superior Courts may judge of their regularity, recites the *information*, usually in the past tense, because unless by consent, or in some particular cases, it must have been preferred some days before the conviction, and should show that it was exhibited within the county and jurisdiction of the justice who issued the

me [or us, &c.,] that *E. F.* of —, in the county of —, on the — day of —, at —, in the said —, did [here set forth the fact for which the information is laid] contrary to the form of the statute in such case made and provided. Whereupon the said *E. F.* after being duly summoned to answer the said charge, appeared before me [or us, &c.,] on the — day of — at —, in the said —, and having heard the charge contained in the said information, declared he was not guilty of the said offence, [or, as the case may happen to be, "did not appear before me (or us, &c.,) pursuant to the said summons,"] [or "did neglect and refuse to make any defence against the said charge."] Whereupon I, [or we, &c., or nevertheless, I or we, &c.,] the Justice, [or Justices,] did proceed to examine into the truth of the charge contained in the said information; and on the — day of — aforesaid, at the parish of — aforesaid, one credible witness, to wit, *A. W.* of —, in the county of —, upon his oath deposeth and saith, [if *E. F.* be present, say in the presence of the said *E. F.*] that within — months [or as the case may be,]

next before the said information was made before me [or us, &c.,] the said Justice by the said *A. B.* to wit on the — day of —, in the year —, the said *E. F.* at — in the said county of —, [here state the evidence, and as nearly as possible in the words used by the witness, and if more than one witness be examined, state the evidence given by each;] [or if the defendant confess, instead of stating the evidence say, and the said *E. F.* acknowledged and voluntarily confessed the same to be true]. Therefore it manifestly appearing to me, [or us, &c.,] that he the said *E. F.* is guilty of the offence charged upon him in the said information, I [or we, &c.,] do hereby convict him of the offence aforesaid, and do declare and adjudge that he the said *E. F.* hath forfeited the sum of — of lawful money of Great Britain for the offence aforesaid, to be distributed [or paid, or as the case may be,] according to the form of the statute in that case made and provided. Given under my hand [or our hands, &c.,] and seal this — day of —, in the year of our Lord —.

C. D. (L. s.)

(g) *Ante*, 189, 190.

(h) *Ante*, 134, 138.

summons. We have seen the necessity for justices returning the information in its precise terms. (i)

It should next state that the defendant was duly *summoned*, especially if he have not appeared; and before the 3 Geo. 4, c. 23, which prescribes a form in this case, it was usual and advisable to describe the summons and state the proceedings thereon, and the oath of the constable as to the time and place of summons. (k) But the 3 Geo. 4, c. 23, merely requires the conviction to state that the party *was duly* summoned and did not appear, and this accords with the usual rule that the Courts will presume that the justices have certified the truth. (l)

The appearance of the defendant, whether in person or by attorney or friend, should be stated according to the fact; and if he objected to the time of the summons, or prayed further time, the facts should be stated accordingly, and what was done thereupon. (m) The conviction is also to state, according to the fact, that the defendant heard the charge contained in the information. Recital of Appearance and defence.

If the defendant *confess*, that fact is by 3 Geo. 4, c. 23, now allowed to be stated thus succinctly, "and the said defendant "acknowledged and voluntarily confessed the same (*i. e.* the "charge in the information) to be true;" and then states the decision of the justice; and any statement of evidence would be unnecessary. Recital of Confession.

Supposing there has been no confession, then at common law (n) as well as according to the form prescribed by the 3 Geo. 4, c. 23, the *names of each witness* in support of the information, and his giving his evidence upon *his oath* in the presence of the defendant, if he have appeared and be present, must be stated. The statement of the name of the witness, we have seen, was considered essential, in order that it might appear affirmatively that he was a different person to the informer, and not interested in the penalty; (o) and if the statute on which the conviction is founded, in terms requires the oath of a *credible* witness, it was held that the conviction must aver that fact. (p) The form prescribed in 3 Geo. 4, c. 23, expressly requires the statement to be "a *credible* witness," (q) and requires that it be stated that the evidence he gave was in the presence of the de- Recital of Evidence.

(i) *Ante*, 185.

(k) See form, Dickenson's Justice, title Convictions.

(l) 10 Mod. 382; *Basten v. Carrow*, 3 B. & Cres. 649.

(m) *R. v. Simpson*, 1 Stra. 44; *R. v. Stone*, 1 East, 639.

(n) *R. v. Crowther*, 1 T. R. 125; *R. v. Bennett*, 6 T. R. 75.

(o) *Ante*, 188; 2 Lord Raym. 1545; 1 Stra. 316; Andr. 18, 240.

(p) *Ex parte Alridge*, 2 B. & Cres. 600; 4 Dowl. & R. 83, S. C.

(q) See form, *ante*, 198, in notes.

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

fendant, but not that he, witness, was *sworn* in his presence. Nor is it necessary to state *how* the witnesses were sworn. (r) In a recent case it was held that from a statement that certain witnesses came before the justices upon their oaths to them severally and respectively administered, it substantially appeared that the oath was administered to the witnesses in the presence of the *magistrate*; (s) and if the appearance of the defendant be stated, and the subsequent proceedings also appear to have been continuous, it will be presumed that they were all in the defendant's presence. (t)

Mode of stating
the evidence.

If there be *several* witnesses, the 3 Geo. 4, c. 23, appears to require the evidence of each to be stated separately. The form also prescribes that each witness shall have stated, if possible, the *day* of committing the offence, and that it was within the *limited time* before the information was made before the justice who received the information; (u) and as well at common law as under this act, the *place* where it was committed must be shown to have been in the county throughout which the convicting justice has jurisdiction. (v)

The mode of stating the evidence of the offence itself is now prescribed and enforced by 3 Geo. 4, c. 23, according to the principles that always were *recommended* by the Courts even at common law, but too frequently not observed, viz. "the statement of the evidence *as nearly as possible in the words used by the witness.*" Justices therefore are not to state what they may think is *the result* of the testimony or proofs, but at least the principal words, without altering their *sense* in any respect. It has, however, been considered that they are not absolutely required in all cases to state *all the very words*, especially where the evidence is irrelevant, although the safer course is to do so, (w) and the *whole* of the evidence, as well for as against the defendant. (x) It is, we have seen, the duty of a magistrate not to suffer the witnesses to swear in the very terms of the statute; (y) and the Courts, we have seen, have laid it down as a rule, that at least the clerks of justices, if not themselves, should

(r) *R. v. Schway*, 2 Chit. R. 522.

(s) *R. v. Glossop*, 4 B. & Ald. 616; but note, the conviction imputed that the evidence was given in defendant's presence.

(t) *Id. ibid.* and *R. v. Lovet*, 7 T. R. 152; *R. v. Swallow*, 8 T. R. 284; *R. v. Crisp*, 7 East, 389.

(u) *R. v. Woodcock*, 7 East, 146; *R. v. Crisp*, *id.* 389.

(v) *R. v. Jeffries*, 1 T. R. 241; *R. v. Smith*, 8 T. R. 538.

(w) *R. v. Warnford*, 5 Dowl. & R. 499; and *R. v. Rix*, 4 Dowl. & R. 354.

(x) *R. v. Clark*, 8 T. R. 220; and per Abbott, C. J. in *R. v. Rix*, 4 D. & R. 354.

(y) *R. v. Allen*, cited Paley on Convictions, by Dowling, 165, in note, 5 Dowl. and Ry. 490, cited.

take down the words as they were used. (z) There are two modes, either of which may be safely adopted; the first to take down the very words of all the *questions and answers precisely* as they were put and answered; and the second merely to set out the statement of each witness as if it were continuous, and omitting the questions. The former, as most strictly complying with the directions of the statute, is recommended as the most explicit and certain. If neither course be adopted, and the justice state only the result, and draw an erroneous conclusion, we have seen he may be compelled to state the evidence in the terms prescribed by the act; and if the affidavits on which the motion for the *mandamus* be founded should raise a suspicion of an unjust motive on the part of the justice, and that he had been previously requested to alter his conviction, but without effect, he may at least have to pay the costs of the motion; (a) and he might be prosecuted if he have wilfully drawn an incorrect result. (b)

With respect to the statement in the conviction of the evidence as to the substance of the charge, justices are only required to state the *facts* correctly, as the witnesses swear; (c) for it is the business of the complainant or informant to see that his information be proved, and the requisites of which we have considered. (d) If there have been averments in the information that the defendant is not within any exceptions in an enacting clause, we have seen that the informer need not in general prove the averment, but the defendant must prove any facts to bring himself within the exception; and unless he do so the conviction need not suppose that the informer gave any evidence, nor need it suppose that any evidence as to the exceptions was given. (e)

Although the form of conviction prescribed by 3 Geo. 4. c. 23, in terms only requires the *whole* of the *evidence* to be stated, and does not prescribe the form that the defendant was formally called upon for his defence, yet it is proper to introduce that statement, after the evidence for the complainant, (f) as thus:—"Whereupon the said defendant is asked by me the
" said justice, what he hath to say or offer in his defence, or
" as evidence against the said information and offence, and in
" answer to the evidence so given as aforesaid, and what he hath

Statement of
the defence
and evidence
for the defend-
ant.

(z) *Ante*, 200, note (w), *R. v. Marsh*, Bar. & Cres. 717; 4 Dowl. & Ry. 260. S. C. *ante*, 189, 190.

(a) *Ante*, 198, and 1 Vol. 793, 4.

(b) *R. v. Pearce*, 9 East, 358.

(c) 3 Geo. 4, c. 23; see form, *ante*, 198,

in note.

(d) *Ante*, 155 to 171.

(e) *R. v. Turner*, 5 M. & S. 206; *R. v. Marsh*, 2 B. & Cres. 717.

(f) See form, in *R. v. Clark*, 8 T. R. 221; 15 East, 456; Paley on Conv. 32.

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

“ to say why he should not be convicted of the said offence ;
“ whereupon the said defendant saith that &c.” [here state con-
cisely the substance of the alleged defence, and if the defen-
dant has called witnesses, state the same, as thus:] “ And
“ thereupon now here one credible witness, to wit, L. M. of,
“ &c. upon his oath deposeth and saith, in the presence of the
“ said A. B. the said complainant, that, &c.” [here state the
terms of the evidence, as nearly as possible in the words used by
the witness, as directed with respect to the evidence for the
informer, and after stating the whole of the evidence on the
behalf of the defendant, state the decision of the justice.]

What evidence
on the face of
the conviction
will suffice to
sustain it.

The very object of the statute thus requiring the evidence as
well for the informer as for the defendant, to be set forth in the
conviction was, that the Court might see upon the face of it
that there had been at least *sufficient evidence* to authorize the
justices to convict, and that also of the *very* offence as charged in
the information, and not of a different offence. (g) If the evi-
dence stated upon the face of a conviction be such as that, *no
reasonable person could draw from it the conclusion of guilty*,
then the conviction would be invalid; (h) but if there be any
evidence that might upon a trial of an action have been left to
the jury, then the conclusion of guilty, drawn by the justice,
cannot be vacated or disturbed. (i) In one of the most explicit
cases on this subject, the Court said, “ If there has been *any*
“ *evidence whatsoever, however slight*, to establish the point,
“ and the magistrate who convicted the defendant has drawn
“ his conclusion from that evidence ; we will not examine the
“ propriety of his conclusion, for the magistrate is the sole
“ judge of the weight of evidence.” (i) Perhaps where there
has been conflicting testimony of several witnessess, and the
magistrate should disbelieve the testimony of one or more, he
should, nevertheless, state the whole of the evidence given ; but
in stating the testimony of the witness he disbelieves, he should
omit the word “ credible,” and add, “ but the testimony of the
“ said Y. Z. was given in a manner which I think, and do find,
“ did not entitle him to credit or to be believed, although stated
“ upon his oath as aforesaid ;” or if any witness swore that the
other witness was not to be believed, the latter testimony should
be stated.

The form of
the adjudication
in general.

After stating the whole of the evidence, the conviction pro-

(g) *R. v. Warnford*, 5 Dowl. & R. 489 ; *R. v. Harper*, 1 Dowl. & R. 214 ;
2 D. & R. Mag. C. 67, S. C.

(h) Per Abbott, C. J. in *R. v. Glus-*

sep, 4 B. & Ald. 616.

(i) *Id. ibid.* ; *R. v. Smith*, 8 T. R. 590 ;
R. v. Reason, 6 T. R. 376.

ceeds immediately to the *adjudication*, which, according to the form prescribed in 3 Geo. 4. c. 23, (*k*) runs, "Therefore it " manifestly appearing to me [*or* us, &c.] that he the said " *C. D.* (naming him) is guilty of the offence charged upon him " in the said information, I [*or* we, &c.] do hereby convict him " of the offence aforesaid, and do declare and adjudge that the " said *C. D.* hath forfeited the sum of —*l.* of lawful money of " Great Britain, for the offence aforesaid, to be distributed [*or* " paid, as the case may be] according to the form of the sta- " tute in that case made and provided. Given, &c." Before this act it was established, that no particular form or style of adjudication was necessary, and the words "that *C. D.* accord- " ing to the form of the statute, is convicted," was considered a sufficient adjudication. (*l*) But it was always considered essential that there should appear that a *judgment* was pronounced, and that the same should in substance be precise and certain, (*m*) and that even in cases where a *forfeiture* or *punishment* would be the legal and imperative result, yet that the justice must *adjudicate* that the same has been incurred, although he had no discretion or power to prevent that result; (*n*) and we have seen, that the form prescribed by the 3 Geo. 4. c. 23, still requires the adjudication as to the forfeiture. (*o*) But as to the *distribution* of any penalty, it was held that when the justice has no discretionary power, it suffices if he adjudges that it shall be distributed or paid according to the statute in that case made and provided, or, "as the law directs;" (*p*) and the form in 3 Geo. 4. c. 23, is to the same effect. But when the distribution is uncertain or discretionary, there must be an express adjudication how the same shall be divided or applied. (*q*)

The form in 3 Geo. 4. c. 23, it will be observed, seems to dispense with the previous *supposed* necessity for the justice, in his *adjudication*, negating any exemptions or exceptions. (*r*)

As to the adjudication negating exceptions.

(*k*) *Ante*, 197, 198, in note.

(*l*) *R. v. Thompson*, 2 T. R. 8; *R. v. Jefferies*, 4 T. R. 768; *R. v. Chandler*, 14 East, 267.

(*m*) Paley, 206, 208.

(*n*) *R. v. Hawkes*, 2 Stra. 858; *R. v. Vipont*, 2 Burr. 1163; *R. v. Ashton*, 8 Mod. 175; *R. v. Harris*, 7 T. R. 238; *R. v. Salomons*, 1 T. R. 251.

(*o*) *Ante*, 198, in note.

(*p*) Salk. 383.

(*q*) *Post*, *R. v. Dempsey*, 2 T. R. 96; *R. v. Priest*, 6 T. R. 536; *R. v. Smith*, 5 M. & S. 133.

(*r*) Before the 3 Geo. 4, c. 23, such

negative in the *adjudication* was *supposed* to be necessary. It was certainly so in the *information*, *ante*, 167, 8; but as the exemption or exception was to be proved by the *defendant*, and unless so proved his guilt was established (*R. v. Turner*, 5 M. & S. 206) it seems absurd to require the justice to *adjudge* upon a matter upon which no evidence had been given before him. There is some confusion in the books upon this point, in consequence of the reporter or author not distinguishing between the requisites of an *information* and of a *conviction*. In *R. v. Jukes*, 8 T. R. 542, the *information* did not ne-

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

Supposing, however, that the statute upon which the proceeding is founded substantially requires the exceptions to be negated in the conviction and adjudication, as well as in the information, then the omission in the former would be fatal, and not aided as matter of *form* by the 3 Geo 4. c. 23. s. 3. (q) In a leading case before that statute, Lord Kenyon said that “the conviction itself should shew that the party accused *had not the defence* which the act gives him;” (r) and therefore, though it seems singular that a justice should be required to find a fact upon which the defendant has not thought proper to adduce any evidence, the safer course may be to introduce the negative adjudication in the conviction, in all cases where the *enacting* clause states exemptions or exceptions. (s)

Statement of
the offence in
the adjudication.

It will be observed, that in the form prescribed by 3 Geo. 4, c. 23, the justice is merely required to state that he convicts “of the offence aforesaid,” meaning the offence as previously charged in the recited substance of the *information*, and which we have seen must correspond with the information as originally framed, and upon which the defendant was summoned. (t) Hence it will follow, that in general, if the *information* was in *substance* defective, the conviction cannot aid; and we have seen, that the conviction cannot be for another, either different or larger offence, than that stated in the information; (u) or, as for an act committed with a *different intent*, or under *another statute* than that charged: (v) thus, we have seen, that if the information charged that the defendant wilfully and maliciously cut and damaged, and carried away a post, or part of a fence, &c., which is an offence against the 7 & 8 Geo. 4, c. 30, the defendant cannot be convicted of merely *carrying it away with intent to steal*, that being an offence under a different act, the 7 & 8 Geo. 4, c. 29. (v)

Statement of
the defendant's
waiving objec-
tions to infor-
mations.

If the original information was defective, and the defendant, upon the hearing, expressly *waived* the objection, then the justice should, before he proceeds further, have the information made perfect, and should state in his conviction that fact, and the defendant's waiving the necessity for a fresh summons; and then the conviction may state “that the defendant was guilty of the said offences so charged in the

negative the exemption; and that was the defect which was considered fatal, although the marginal analysis only refers to the conviction.

(q) *R. v. Jukes*, 8 T. R. 542.

(r) *Id.* 544.

(s) *R. v. Turner*, 5 M. & S. 206; see *ante*, 167, 8, 191, 2; and see the form,

Chitty's Game Laws, 2d edit. 750.

(t) *Ante*, 185.

(u) *Rogers v. Jones*, 3 Bar. & Cres. 409; 5 Dow. & Ry. 268; *R. v. Soper and others*, 3 Bar. & Cres. 857; 5 Dow. & Ry. 669, S. C.

(v) *R. v. Harper*, 1 Dowl. & Ry. 223.

(w) *Id.* *ibid.*

“ said information, when the same had been so amended by
“ and with the said defendant’s consent as aforesaid.”

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

We have seen the *necessary certainty* in an *information*, (*x*) and which must also be observed in the conviction, whenever it is necessary therein to set forth the circumstances of the offence. It has recently been decided, that in a conviction and commitment under the Game Act, for trespassing *on land* in the day time in pursuit of game, it is sufficiently certain to state that the defendant trespassed in pursuit of game on *certain land* in the possession of *A. B.*, without giving the land any name, or setting it out with abuttals. (*y*) But it must be observed, that in general questions as to certainty in the description of an offence more properly relate to the information than the conviction.

Certainty in
stating the of-
fence.

It is clear, that in cases where it is essential to the charge, that not only an act has been committed, but also that to complete the offence, it should have been committed under certain *collateral circumstances*, then the information must have averred those facts, or a conviction upon it would not be sustainable. (*z*) So, if the information charged the offence in the alternative, “ as used, *or* intended to use,” and this alternative charge be *continued* in the conviction, the latter could not be sustained. (*a*) And even if the defendant appear, and do not object on the hearing to the uncertain charge in the information, and the evidence establish that the defendant was guilty of one part of the charge, even then it has been held, that the justice cannot in his conviction aid the defect in the information, by adjudging, not that the defendant was guilty of *the offence aforesaid*, but that he was guilty of *that part* of the charge which had been so established. (*b*)

Uncertainty in
the informa-
tion, when or
not aided by
conviction.

We have seen, that although not usual, nor in general advisable, yet several offences may be included in the same information and stated in several counts, or parts thereof; and, consequently, may also be adjudicated upon in one conviction. (*c*) If the justice convict of *all* the offences charged in the information, his conviction should be in the plural, “ of the offences aforesaid;” or he may distinctly adjudicate on each. If there be several offences charged in the information, a con-

Conviction of
several of-
fences.

(*x*) *Ante*, 155, to 171, as to certainty in general.

(*y*) *R. v. Mellor*, 2 Dowl. Prac. Rep. 173.

(*z*) *Ex parte Hawkins*, 2 B. & Cres. 21; 3 Dowl. & R. 209.

(*a*) *R. v. Pain*, 5 B. & Cres. 251; 7 Dowl. & R. 678, S. C.; *R. v. North*, 6

Dow. & Ry. 143.

(*b*) *R. v. North*, 6 Dow. & Ry. 143, *sed quare*; and note that in that case the conviction *continued*, and did not attempt to aid the ambiguity.

(*c*) *Ante*, 169; *R. v. Swallow*, 8 T. R. 286.

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

viction, stating that the defendant was guilty of the *offence* aforesaid, would, it has been considered, be void for uncertainty which of the several offences was referred to. (d) When the justice intends to convict of one of several charged offences, he must be particular in shewing which; and should, in terms, acquit or dismiss the complaint as to the residue.

Adjudication
as to forfeiture,
punishments,
&c.

As respects the forfeiture or punishment, we have seen that the form prescribed in the 3 Geo. 4, c. 23, continues the necessity for an adjudication, even where the penalty or imprisonment is fixed, and the justice has no discretion. (e). Where the statute gives any discretionary judgment, then it will be obvious that the justice must be certain and explicit in his adjudication. (f) But if the statute require a conviction in a penalty, and then adds, that on default of payment, the party shall be subject to certain corporeal punishment or imprisonment, it suffices to adjudge the payment of a prescribed penalty without noticing the *contingent punishment*, which must be the subject of a subsequent application to a justice. (g) As regards the adjudication for a fixed penalty, if it name too small a sum, it will be as invalid as if it were too large. (h) If the penalty is to be only according to the *value*, or the amount of the *real injury*, then the justice must take care duly to ascertain the amount, and adjudicate accordingly; and if the injury were less, his direction to pay the largest sum he has power to fix, when greatly exceeding the actual damage, would be improper, if not invalidate his conviction on appeal. (i) When the penalty is in the *discretion* of the justice, he should take care and exercise a sound discretion, and fix the proper amount, especially when he has power to *mitigate* a penalty fixed by the act; (k) and it is said that in the latter case the conviction should first fix or name the penalty incurred by the statute, and then, in a separate sentence, state to what smaller sum the justice does thereby mitigate it, for otherwise it could not appear that he had exercised his authority in both points according to the terms of the statute. (l) But it would seem sufficient for the justice at once to adjudicate “that the defendant hath forfeited and shall pay a named sum

(d) *R. v. Salomons*, 1 T. R. 249; and yet it has been held, that “*misdemeanor*,” in the singular, is *nomen collectivum*, and may include several crimes of that nature.

(e) *Ante*, 198, in note; and *R. v. Harris*, 7 T. R. 938; *R. v. Hawkes*, 2 Stra. 858.

(f) *R. v. Vipont and others*, 2 Burr. 1163; and see Burn J. tit. Commitment.

(g) *R. v. Chandler*, Carth. 501; *R. v. Helps*, 3 M. and S. 331.

(h) *R. v. Salomons*, 1 T. R. 249.

(i) *R. v. Harper*, 1 Dowl. and R. 223.

(k) *Reeve v. Poole*, 4 Bar. and Cres. 156.

(l) *Dick. Sessions*, 3d ed. 595; *Paley*, 209, 210; and see form, *Chitty's Game Law*, 2d edit. 765; 1 Burn J. 851.

“ as the penalty for his said offence, mitigated by me the said justice, pursuant to the statute.”

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

The form, in 3 Geo. 4, c. 23, concludes “ to be *distributed* or “ paid according to the form of the statute in that case made “ and provided;” but this only applies when the justice has no discretion; when he has, he must carefully exercise it, and declare in express terms how he has done so, or the conviction may be void.^(m) The form under the 7 & 8 Geo. 4, c. 29, and c. 30, state by what terms, and when the penalty is to be paid to the party aggrieved, or when and how otherwise.⁽ⁿ⁾ If there be any uncertainty in the parish or township, to whom the penalty or a part is to be paid, it will be void;^(o) and where the penalty is to be paid to the person who seised the forfeited article, the evidence as well as the adjudication must expressly show who, in particular, effected the seizure, to whom the money is to be paid, or the conviction would, on *certiorari*, be quashed.^(p)

Distribution or
application of
the penalty.

The acts giving summary proceedings for small offences sometimes contain particular directions relative to *costs*; but independently of any such particular provisions, the *general act*, 18 Geo. 3, c. 19, provides for the costs of such proceedings, as well for the informer as the defendant. It enacts that “ where *any* “ complaint shall be made to a justice, &c., and any warrant or “ summons shall be issued, it shall be *lawful* for the justice or “ *justices, &c. who shall have heard and determined the com-* “ *plaint*, to award such *costs* to be paid by *either of the parties*, “ and in manner and form as to him or them shall seem fit, to “ the party injured; and if not forthwith paid, the said justice “ or justices, by warrant under their hand and seal, may levy “ the same by distress and sale of the goods and chattels of the “ person; and if no goods, may commit the party to the house “ of correction for the county where he resides, there to be kept “ to hard labour for not less than ten days, nor more than one “ month, or until such sum, together with the expenses attend- “ ing the commitment, be first paid.” Under this act, or any other that authorizes a justice on summary conviction to award the costs of or *antecedent* to conviction, he must ascertain and insert the same in his conviction, and not leave the amount in the discretion of the constable or other person; and an adjudication even that the defendant shall pay the *reasonable* charges of a *levy*, was holden bad, however difficult it may be for a jus-

Adjudication
for costs.

^(m) *Ante*, 198, in note; *R. v. Smith*, 5 M. & S. 133; *R. v. Dempsey*, 2 T. R. 96.
⁽ⁿ⁾ *Ante*, 138.

^(o) *R. v. Priest*, 6 T. R. 538.
^(p) *R. v. Smith*, 5 M. & S. 133.

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

tice to ascertain the contingent expense. (q) In a late case it appeared that the warrant of commitment, under the then Stage Coach Act, 50 Geo. 3, c. 48, recited the conviction, from which it appeared that the defendant had been committed by the justices for three months, "unless before that time he pays the sum of 6*l.*, together with the expenses of the warrant, viz. a sum of — shillings," without specifying the precise sum he was to pay for expenses; and Abbott, C. J., said the defendant here certainly cannot know on what terms he is to be discharged, and the gaoler is equally in the dark. The conviction and commitment should have ascertained *precisely what sum* for expenses the defendant was to pay. Let the conviction be quashed and the defendant discharged. (r) But the 27 Geo. 2, c. 20, s. 2, enables the constable or officer making a distress for a penalty, to deduct the reasonable charges of taking, keeping, and selling the distress, out of the money arising from the sale, and he is to pay the overplus to the party distrained upon; and in that case the *officer*, and not the justice, is to fix correctly and at his peril, the reasonable costs. (s) If the officer retain too much, he may be sued for the amount; (t) and if he neglect to return what he has done, the justice may fine him. (u)

Conclusion of
conviction, and
the date, sign-
ing and seal-
ing.

The form prescribed in 3 Geo. 4, c. 23, concludes, "Given under my hand [or, under our hands] *and seal*, the — day of — in the year of our Lord —." This form implies that the convicting justices must respectively *sign* and actually formally *seal and deliver* or execute the conviction as if the same were their deed, the latter ceremony importing that they have fully considered or resolved upon the antecedent conviction as the result of their judgment and determination. (v) These were always at common law considered essential to the validity of a conviction. (w) The date is essential to show the time when the conviction was made, which sometimes we have seen is

(q) *R. v. Payne*, 4 Dowl. and R. 72; *R. v. Symons*, 1 East, 189; *R. v. Patchett*, 5 East, 330; *R. v. Nottingham*, 12 East, 57; and see *R. v. Elwell*, 2 Lord Raym. 1514; *R. v. Hill*, Cowp. 60, S. P.

(r) *R. v. Payne*, 4 Dowl. and R. 72. In these cases the justice might with propriety insert a sum in his conviction and warrant to levy or commit sufficient to cover any *contingent prospective expenses*, as the reasonable expenses of the constable in travelling to make a distress or seizure, the keeping such distress for seven days, the valuing the

same, and the expense of an auctioneer's selling the same, with the auction duty, if any; and then if the defendant should pay the amount immediately he might be allowed a rebate for charges not incurred.

(s) See also the general act, 5 G. 4, c. 18, *post*.

(t) *Umphelly v. M'Lean*, 1 B. and Ald. 42.

(u) 1 Salk. 380; Paley, 244.

(v) *Ante*, 198, in note; Plowd. 308.

(w) *R. v. Eleval*, 2 Stra. 794; *Basten v. Carew*, 3 B. and Cres. 649; Dalt. Justice, chap 115.

essential; (x) and yet it has been holden that if the date were impossible or incongruous, it may be rejected as surplusage, and will not vitiate if the correct time can be ascertained. (x) But the time of the actual subscription and sealing is not material, nor need it correspond with that on the face of the conviction. (y) We have considered when in case of a conviction by two or more justices, they must be both present together at the same time pending the hearing of the evidence, and actually concur and sign their conviction. (z)

The foregoing observations principally refer to the *common law* requisites of a conviction, and those prescribed by the *general act*, 3 Geo. 4, c. 23, but which expressly excepts other cases where any *particular act* prescribes *another* form; (a) and we have seen that most of the modern acts, as the 7 & 8 Geo. 4, c. 29, and c. 30, 9 Geo. 4, c. 31, 1 & 2 W. 4, c. 32, prescribe a particular form to be observed, and which must not be materially departed from. (b) As respects these, as well as convictions in the form prescribed by the 3 Geo. 4, c. 23, the general rule to be observed is, that the *very words* directed to be used, must be literally pursued, when the statute says, that the conviction shall be in the form following: (c) or if the enactment be “*or in words to the same effect*,” then that the conviction must either *strictly* adopt the prescribed form, or at least must be according to the *intent and purpose* of the act. (d) And in all these cases, as under the 3 Geo. 4, c. 23, the justice might, by *mandamus*, be compelled to reform an imperfect conviction, according to the spirit of the statute. (e) Some acts give so general a form of conviction, as not even to disclose what particular offence had been committed, but merely that “the party was convicted of a certain offence contrary to law,” (f) whilst others permit the omission of any statement of the information, summons, or evidence, and merely require the magistrate to shew of what offence he has convicted the party. In these cases it has been justly observed, that great precision and certainty

Convictions
upon particu-
lar statutes.

(x) *R. v. Picton*, 2 East, 196.
(y) *Id. ibid. R. v. Barber*, 1 East, 185.
(z) *Ante*, 192, 197, 8, note (f).
(a) 3 Geo. 4, c. 23, s. 1, *ante*, 197, 8.
(b) *Ante*, 132 to 143.
(c) *R. v. Jefferies*, 4 T. R. 769, *ante*, 198.

(d) *R. v. Priest*, 6 T. R. 538.
(e) *Semble ante*, 200, 201.
(f) See the constitutional observation of Mr. Adolphus, in his able observations on the enormous and dangerous powers given to a single justice by the Vagrant Act, 5 Geo. 4, c. 83, and other acts; Pamphlet published A. D. 1824.

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

ought to be, and is required, in showing the jurisdiction of the justice, and the offence, and a negative of all circumstances that might by any exception in the enacting clause in the act have afforded ground of defence. (g) Very frequently a concise and *prima facie* very easy form, is given in particular acts, with a short direction in these terms: "*here state the offence*," leaving a blank in the form where it is to be introduced. In these cases the justice must observe all the requisites of an information in stating the *offence*, which we have already so fully considered. (h) So that in those cases, he in reality incurs more trouble and risk than in ordinary cases, where the *informer* must lay before him an information in all respects unobjectionable. (i) In these, and indeed in all other cases, *unnecessary particularity* in stating more than is absolutely required will not prejudice, but will be rejected as surplusage; (k) and therefore in cases of doubt, the best course is to set forth every thing that has been proved. (l)

Defects in convictions, when aided.

If it appear upon the face of a conviction that no offence was committed, then it will be invalid; and in case any proceeding by distress or imprisonment should take place under colour of the same, the magistrate who issued the warrant thereon will, although the conviction remain *unquashed*, be liable to an action of TRESPASS for the seizure or imprisonment; or if the same has been quashed, he may be liable under the 43 Geo. 3, to an *action on the case*, if malice can be proved. (m) If a conviction be *legal on the face of it*, then as long as it stands unquashed, it will protect the magistrate for any thing done under it. (n) In these cases also, if the conviction, although correct in form, was nevertheless improper on the *merits*, and an appeal has been *expressly given* to the convicted party; he may again try the *merits* on certain terms by appeal to the session, (*viz.*, in general those of entering into a recognizance, and giving notice of appeal); and if there be a material defect in the conviction or previous proceedings, and the writ of certiorari be not *expressly taken away*, then the defendant may remove the same into the Court of King's Bench, and

(g) Dick. Sess. 3rd ed. 394, 5; *R. v. Neild*, 6 East, 417.

(h) *Ante*, 162, to 169.

(i) *R. v. Hazell*, 13 East, 139.

(k) *Ante*, 158.

(l) *R. v. Jefferies*, 4 T. R. 768.

(m) *Post*, 230.

(n) *Gray v. Cookson*, 16 East, 21; 1 Brod. & Bing. 432, 457; 7 T. R. 623, and *post*, 228 to 231.

there cause the conviction to be quashed and prevent process thereon; or if such process has issued and been enforced, he may obtain restitution, or release from imprisonment. At common law it frequently occurred, that although the conviction was just and proper as regarded the defendant's *guilt*, yet some formal defect was afterwards discovered by the defendant in the conviction, which enabled him to quash the conviction, and this at a time when it was too late to proceed *de novo*; and although some particular statutes limited the defendant's power in a few cases, there was *no general statute of amendment* relative to conviction, until the 3 Geo. 4, c. 23; the 3rd section of that statute therefore enacted, "That in all cases where it appears by the conviction, that the *defendant has* appeared and pleaded, and the *merits* have been tried, and that the defendant has not appealed against the said conviction when an appeal is allowed, or if appealed against, the conviction has been affirmed, such *conviction* shall not afterwards be set aside or vacated in consequence of any *defect of form* whatever; but the construction shall be such a *fair and liberal construction*, as will be agreeable to the justice of the case."

It will be observed, that this act only applies to a conviction *after* the defendant has *appeared and pleaded*, and only extends to defects in *form*; convictions therefore *ex parte*, where the defendant having been summoned, has neglected to appear, or having appeared will not plead, or otherwise say not guilty, and defend upon the hearing, are not, when defective even *in form*, aided by this act, nor are defects in *substance* in any case aided.

It was decided under an antecedent act, containing an aiding clause somewhat similar, that the omission to state in the *information and conviction*, *exceptions* in the enacting clause, was a defect in *substance*, not aided by such enactment. (o) We have seen that appearance *and pleading* to an information, aids any defect in the summons, or even the total omission thereof, unless the defendant prays further time. (p)

We have adverted to the perhaps questionable *right* of the defendant to have a copy of the conviction delivered to him by the justice; and the *duty* of the justice, within a reasonable time, to *return his* formal conviction in writing to the clerk of the sessions, in order that the defendant may at least *there*

Delivery of copy of conviction, and returning conviction to sessions.

(o) *R. v. Jukes*, 8 T. R. 536.

(p) *Ante*, 176.

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

obtain a copy, and take due proceedings for an appeal when given, and to secure the due appropriation of the penalty when paid or levied. (q) If the justice has delivered a copy to the defendant, and returned a varying copy to the sessions, the Court can only proceed on the latter. (r)

Enforcing the
payment of
penalty or
punishment.

When a reasonable doubt is suggested as to the legality of the conviction, or the *right*, or the *means* of enforcing payment of the penalty or punishment, the Court of King's Bench will not compel the justice to incur the risk of an action; (s) but will by mandamus compel the issuing of a proper warrant, if the suggestion of risk be colourable or not unreasonable. (t) The general rule is, that when a conviction is of *doubtful validity*, the Court will not compel a justice to issue his warrant; (u) but if the objection be merely in a defect *in form*, and therefore the conviction is not void, or would be aided by 3 Geo. 4, c. 23, s. 3, then it would be otherwise. (v)

Execution on
the conviction
by *warrant of
distress* or of
imprisonment.

The *modes* of enforcing a conviction adjudging that a *pecuniary penalty* shall be paid, either with or without costs, depend entirely on the *particular act* creating the offence, and whether it *expressly* authorizes a distress warrant. If it contain such an *express* enactment, then the *general* act 5 Geo. 4, c. 18, enables the justice either to issue a *distress* warrant or a warrant of *commitment*; and which by the 2nd section of 3 Geo. 4, c. 23, may be issued either by the convicting justices, or by *any one justice* of the county where the conviction took place; and it should seem that in *all* cases, the payment of the *costs* of a summary conviction may be enforced by distress, under the express enactment of 18 Geo. 3, c. 19. (w)

Distress war-
rant. (x)

But at *common law*, and by the *present general law*, no *warrant of distress* upon *goods* can be issued or levied; and it is only by *particular statute* and *express* enactment, that even at this day a *distress* can be made. (x) Therefore in each particular case the statute upon which the summary proceeding is founded must be examined, to ascertain the precise powers. The general act 5 Geo. 4, c. 18, s. 1, only applies in cases where

(q) *Ante*, 196, 7.

(r) *R. v. Allen*, 15 East, 332; and see *R. v. Jukes*, 8 T. R. 625; *R. v. Medlam*, 3 Burr. 1720; *post*, 217.

(s) *Ante*, 173, 4.

(t) *Id. ibid.* *R. v. Robinson*, 2 Smith R. 274.

(u) *R. v. Broderip*, 5 Bar. & Cres. 239; 7 Dowl. & Ry. 861; *R. v. Robinson*, 2

Smith R. 274; *R. v. Buckinghamshire*, 1 B. & Cres. 485; 2 Dowl. & R. 689; *ante*, 1 Vol. 794.

(v) *R. v. Robinson*, 2 Smith R. 274; Dick. Seas. 576, 3d edit.

(w) *Ante*, 207.

(x) See fully Burn J. tit. Distress, and cases there cited; 6 East, 175; Paley, 234.

some act has *expressly* authorized a *distress warrant*, and then that act gives the justice a discretionary power to proceed by distress or commitment, as he may think would be the least injurious to the offender and his family. The four recent *general acts*, 9 Geo. 4, c. 31. s. 27, 7 & 8 Geo. 4, c. 29. s. 67, 7 & 8 Geo. 4, c. 30. s. 33, and 1 & 2 W. 4, c. 32. s. 38, 9, appear to suppose that only a warrant to *commit* for the penalty incurred by committing a *common assault or battery*, or *petty stealing*, or small *wilful or malicious injury*, or *trespass* in pursuit of *game*, shall be issued, *and not a distress warrant*; and therefore, it should seem that no distress can be sustained on these acts, though, perhaps, under the *general act* 18 Geo. 3, c. 19, the *costs* may be *distraigned* for. Probably the legislature considered that a warrant to commit would be *less expensive* than a distress warrant, and therefore enjoined that course of proceeding. The *general act* 5 Geo. 4, c. 18, contains very full directions and discretionary powers when a justice has authority to issue a *distress warrant*, and then superadds as an incident the power of commitment; and he may then imprison in the first instance without waiting for a return of *nulla bona* upon a distress warrant. To avoid any useless extension of this part of the subject beyond our present limits, the reader is requested to refer to the 26th edition of Burn's Justice, title Distress and Commitment, for the whole law applicable to those modes of enforcing a conviction. (y)

Although the statutes use the term *distress*, yet the proceeding is in the nature of an *execution*, and goods taken under a distress founded upon a conviction under the game laws, or other penal statute, are not repleviable. (z)

No replevin
lies.

When a distress has been authorized, then the 27 Geo. 2, c. 20, contains a general power *to sell* the distress at such time as the justice may direct; and the 33 Geo. 3, c. 55, authorizes justices to execute a warrant of distress in a county different to that where the conviction took place, on the warrant having been duly backed or indorsed by a justice of the county where the offence was committed.

Sale of goods
distraigned, &c.

Defects in warrants of commitment before the enactments in the four recent general acts we have noticed, were a very fertile source of litigation. They should strictly pursue the conviction upon which they are founded. And it was recently decided, that

Commit-
ments. (a)

(y) Titles Distress, Commitment and . J. tit. Distress, 1 Vol. 1021.

Costs.

(a) See fully, Burn J. tit. Commit-

(z) *R. v. Burchett*, 8 Mod. 209; Burn ment.

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

although there had been a valid conviction, yet, that if the commitment were by a small mistake or variation on the face thereof for a different offence, or even if it did not disclose any offence at all, the magistrate who issued the warrant of commitment was liable to an action of trespass, merely on account of such deviation and discrepancy; (b) and although there is no *general* act to remedy this hazard in framing a commitment, yet all the four recent acts expressly provide for it by enacting, "that no warrant of commitment shall be held void by reason of any defect therein, provided it be therein alleged that the party has been convicted, and there be a good and valid conviction to sustain the same." (c) In general, before the Court would quash a commitment, they required the conviction to be returned upon certiorari. (d) But although all the four acts alluded to, expressly take away a certiorari, so as to prevent the Superior Courts directly removing the supposed conviction, in order to ascertain whether or not there has been a sufficient conviction to support the commitment; yet the Court in which the question respecting the validity of the commitment is under discussion, may ascertain the contents of the conviction, by examining a verified copy. (e)

Under the 5 Geo. 4, c. 18. s. 2, it has been very recently decided, that the justice's authority to detain a convicted party must be in writing, and not verbal; and that a detention without written commitment, for a longer time than is absolutely requisite to draw up a warrant in due form, is not authorized. (f)

Although usual and proper, yet it seems that a demand of the penalty is not absolutely necessary to precede or be stated in the warrant of commitment, unless expressly required by the statute. (g)

Appeal to ses-
sions. (h)

If the party convicted think that the conviction was contrary to the *weight of evidence*, or that in cases where the justice had a discretionary power, he has awarded *too large a penalty*, he may in some cases, on showing himself to be a party aggrieved, (i) appeal to a higher tribunal, as the sessions, and in

(b) *Wicks v. Clutterbuck*, 2 Bing. 483; and see other cases, Burn J. tit. Commitment in Execution.

(c) 9 Geo. 4, c. 31, s. 36; 7 & 8 Geo. 4, c. 29, s. 77; id. chap. 30, s. 39; and 1 & 2 W. 4, c. 32, s. 45, all in exactly the same terms.

(d) *R. v. Taylor*, 7 Dowl. & R. 622; *R. v. Rogers*, 5 B. & Ald. 773; 1 Dowl. & R. 156, S. C.

(e) *R. v. Mellor*, 2 Dowl. Pra. Rep.

173.

(f) *Hutchinson v. Lowndes*, 4 B. & Adolph. 118, qualifying *Still v. Walls*, 7 East, 533.

(g) *Ex parte Edwards*, 8 Dowl. & R. 115; but see *R. v. Bucks*, 1 B. & Cres. 485.

(h) See in general, Burn J. tit. Appeal; and id. *Poor Law Index*, tit. Appeal.

(i) Who is not a party aggrieved, *R. v. J. Madden*, 3 B. & Adolph. 938.

effect obtain a *new trial* upon the *merits*. (k) But unless an *appeal* be *expressly*, or by the terms of the particular act, *clearly impliedly given*, none is sustainable. (l) Thus, in case of a conviction for a common assault or battery before two justices, *no appeal* is given; (m) and, although under the 7 & 8 Geo. 4, c. 29. s. 72, and c. 30. s. 38, an appeal lies from a conviction when the penalty exceeds 5*l.*, or the adjudged imprisonment would exceed one calendar month, or when the conviction has been before only one justice, yet when the conviction under either of those acts is for a sum not exceeding 5*l.*, or before two justices, no appeal is given. As there is no *general act* giving or prohibiting an appeal, it is always necessary in each particular case to examine all the statutes relating to the subject, so as to ascertain whether an appeal is or not afforded.

When the party has a right to appeal, he is in strictness bound to know the law; and unless expressly so directed by a particular statute, it is not legally incumbent on the justices to inform him of his right, though they must not mislead; and it may be advisable for them in general to inform the party of his right. (n) The defendant however may in *all* cases waive his right to be informed, as by declaring that he will not appeal. (o)

In most cases the act giving an appeal imposes as a condition *the terms* of entering into a *recognizance* with *two* sufficient sureties, to abide the judgment of the Court of Appeal, and pay the costs, if any, that may be adjudged; and this, when imposed, is a condition precedent, the performance of which cannot be dispensed with. (q) The *form* of recognizance, in the subscribed note, was settled by counsel in a recent case, and may be safely acted upon; and in similar cases the following form of *affirmance* of the conviction and for the costs of appeal, pronounced in the same case by the Court of Sessions, may also be safely relied upon. (r)

(k) See in general, Burn's Justice, tit. Appeal.

(l) 2 T. R. 509; 1 M. & S. 448; 4 B. & Ald. 521; 1 B. & Cres. 64; R. v. Stone, 6 East, 514; 1 Wightw. 22.

(m) 9 Geo. 4, c. 31.

(n) R. v. Leeds, 4 T. R. 583.

(o) R. v. Yorkshire, 3 M. & S. 493; 7 and 8 Geo. 4. c. 29, s. 72, and id. c. 30. s. 38.

(p) See in general for full particulars, Burn's Justice, 26th edit. tit. Recognizance.

(q) See Burn J. tit. Recognizance.

The parts of Holland, in } Be it remembered, that on the 16th day of Febru-
the County of Lincoln. } ary, in the third year of the reign of our Sovereign
Defender of the Faith, and in the year of our Lord 1833, J. W., of Leverton, in the

(r) Form of
recognizance,
on an appeal
against a
conviction
under the
Game Act, 1 &
2 W. 4. c. 32.

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

Notice of ap-
peal.

In general there must be a notice of appeal, stating explicitly all the objections to the conviction or proceedings on which the

parts of Holland, in the county of Lincoln aforesaid, farmer, and *W. D. G.*, of Boston, in the parts of, &c. aforesaid, butcher, personally came before me *A. D.*, Esquire, one of His Majesty's Justices of the Peace for the parts of Holland aforesaid, and acknowledged themselves to owe to our said lord the King the sum of 10*l.* each, of good and lawful money of Great Britain, to be made and levied of their several goods and chattels, lands and tenements, to the use of our said lord the King, his heirs and successors, if default shall be made in the condition hereunder written. Whereas, by a certain conviction under the hand and seal of me the said *A. D.*, the above bounden *J. W.* is convicted, for that he the said *J. W.*, on Monday the fourth day of the said month of February, did commit a trespass by entering in the day time upon certain lands in the parish of Leverton, in the parts of Holland aforesaid, in the county of Lincoln aforesaid, in the occupation of James Woollerton, the informant in the information upon which the said information was found, in search of game, contrary to the statute in such case made and provided. And whereas the said *J. W.*, hath given notice unto the said James Woollerton of his intention to appeal against the said conviction, and of the causes and grounds thereof. Now the condition of this recognizance is such, that if the above bounden *J. W.* shall personally appear at the next general quarter sessions of the peace, to be holden at Boston for the parts of Holland aforesaid, and shall then and there try such appeal and abide the judgment of the said court of quarter sessions, and pay the costs occasioned by such information, conviction, and appeal, as shall seem meet to and be awarded by the justices at such quarter sessions; then this recognizance to be void, otherwise of force. Taken and acknowledged before me, *A. D.*

Form of judgment of *affirmance* of the sessions, on an appeal against a conviction on the Game Act, 1 & 2 W. 4, c. 32. (s)

Lincolnshire, { At a general quarter sessions of the peace of our sovereign
Holland. { lord the King, held by proclamation at Spalding, in and for the
parts of Holland within the county of Lincoln, on, &c. in the
year of the reign of our sovereign lord William the Fourth, that
now is King of the united kingdom of Great Britain and Ireland, and in the
year of our Lord 1833, before *A. B.*, *C. D.*, *E. F.*, and others, their fellows,
the justices of our said lord the King assigned to keep the peace of our said
lord the King within the parts of Holland aforesaid, and also to hear and de-
termine divers felonies, trespasses, and other misdemeanors done and com-
mitted within the said parts in the said county, and one of whom is of the
quorum.

And afterwards, by adjournment (to wit) at Boston, in and for the said parts, on, &c. in the third year of the reign aforesaid, before *G. H.*, *I. K.*, *L. M.*, and others, their fellows, also the justices of our said lord the King assigned to keep the peace of our said lord the King within the parts of Holland aforesaid, and also to hear and determine as aforesaid, within the said parts in the said county, and one of whom is also of the quorum.

At the same Court so held at Boston, on the day and year aforesaid, *J. W.*, of Leverton, in the parts of Holland, in the county of Lincoln, farmer, entered his appeal to and against a conviction, under the hand and seal of *A. D.*, Esquire, one of His Majesty's Justices of the Peace for the parts of Holland aforesaid, dated and made on the 13th day of February, 1833, for that he the said *J. W.* did, on Monday, the 4th day of February then instant, commit a trespass, by entering in the day time upon certain lands in the parish of Leverton, in the parts of Holland aforesaid, in the county of Lincoln aforesaid, in the occupation of James Woollerton, in search of game, contrary to the statute in such case made and provided; and by which said conviction he the said *A. D.* did adjudge that the said *J. W.* should for the said offence forfeit the sum of two pounds, together with the sum of seventeen shillings for costs, and did order that the said sums should be paid by the said *J. W.* on or before the 20th day of February last, and that in default of payment on or before that day he the said *A. D.* did by the said conviction adjudge the said *J. W.* to be imprisoned and kept to hard labour in the House of Correction at Shirbech Quarter, in the parts of Holland, in the county of Lincoln aforesaid, for the space of two calendar months, unless the said sums should be sooner paid; and that the said *A. D.* did, in and by the said conviction, direct that the said sum of two pounds should

(s) This judgment of sessions was the printed and MS. precedents, and settled by counsel after examining all with care.

same is founded, and which must be served upwards of the prescribed time; or when the time has not been prescribed, then a reasonable time (usually eight days) fixed by the practice of each session. (t) If the charge in the conviction be general, as under the Vagrant Act, 5 Geo. 4, c. 83, s. 4, the notice of appeal may merely state that the defendant was not guilty of the supposed offence; (u) but in general it must state all the particular objections very distinctly. (v) If the notice be too short, the Court of Sessions should receive the appeal, and respite and adjourn the hearing. (w)

If the Court of Sessions should erroneously quash a conviction for want of form, that is not an acquittal on the merits, so as to preclude the Court of King's Bench from commanding the sessions, by *mandamus*, to rehear the conviction upon the merits; (x) but where the sessions affirmed a conviction, which afterwards, on *certiorari*, was bad, and it was discovered that the justices had not returned the original correct information to the sessions, the Court of King's Bench refused a *mandamus* to return the original information which had not the defect, or to compel the magistrates to proceed on the original information. (y)

When sessions, quashing conviction, not conclusive.

With respect to the costs of appeal, the Game Act, 1 & 2 W. 4, c. 32. s. 44, and other modern acts, expressly give the sessions power to *award costs*; and the concluding words of that section also give authority to the Court of Session to *issue process* to enforce every part of their judgment, affirming the conviction and awarding costs by the like process as the con-

be paid to P. S., being one of the overseers of the poor of the said parish of Leverton, to be by him applied according to the directions of the statute in such case made and provided; and that the sum of seventeen shillings, for costs, should be paid to the said James Woollerton, the informant on the information upon which the said information was founded.

Now therefore, at the said Court so holden as aforesaid by adjournment at Boston as aforesaid, upon hearing of the said appeal, it is now here ordered and adjudged by the said Court that the said conviction be, and the same is hereby in all things affirmed; and it is also now here by the same Court further ordered and adjudged that the said J. W. be dealt with and punished according to the said conviction; and also that he the said J. W. do and shall pay to the said James Woollerton, the said informant, and the respondent in the said appeal, the sum of 10*l.* 3*s.* 2*d.*, the amount of the costs sustained by the said James Woollerton, and by him incurred by reason of the said appeal, and now by the said Court here adjudged to be paid to him by the said J. W. according to the statute in such case made and provided.

The judgment of affirmance.

Costs of appeal.

(t) See fully Burn J. tit. Appeal, and tit. Poor Law, Index, Appeal, and Notice.

(u) *R. v. Newcastle*, 1 B. & A. 933.

(v) 10 Bar. & C. 226, 792.

(w) *R. v. Wills*, 8 B. & C. 380;

2 Man. & R. 401, S. C.; *R. v. Lancashire*, 7 B. & C. 691; S. P. 10 B. & C. 393.

(x) *R. v. Ridgway*, 5 B. & Ald. 527; 1 Dowl. & R. 132, S. C.

(y) *R. v. Jukes*, 8 T. R. 625; see *R. v. Allen*, 15 East, 332; *ante*, 211, 212.

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

victing justices might have issued; or if preferred, proceedings might be issued to enforce the recognizance given under the 44th section, and which must have been conditioned for obedience to the decision of the Court of Appeal.

In general, upon an appeal under the 44th section of 1 & 2 W. 4, c. 32, the respondent ought to begin, and to prove the facts of guilt of the trespass over again, precisely as in evidence to the original information, with the exception of the facts mentioned in the 42d section; and either party might give fresh evidence, not even mentioned on the first occasion. (z)

Mandamus to compel justice to state evidence, &c. in conviction, under 3 G. 4. c. 23.

We have seen that if the conviction do not sufficiently state or mistate the substance of the evidence given by the witnesses and not as nearly as possible in the words used by them, and also the defence advanced by the defendant at the time of the hearing, the defendant may, by application to the Court of King's Bench, under the 3 Geo. 4, c. 23, compel the justice to rectify his conviction in this respect. (a) When it is apprehended that the justice has returned or intends to return to the Sessions or to the Court of King's Bench a conviction defective in either of these respects, then the proper course is, antecedent to a motion for a writ of *certiorari*, to apply to the justice in a courteous manner, and even in writing, and to require him to state the evidence correctly; and if any person present at the hearing took an accurate note of the evidence, it would be proper to send a copy thereof to the justice to assist him, and with an intimation that unless the conviction should contain all the evidence correctly, it will be necessary to apply to the Court of King's Bench for a writ of *mandamus*; and a motion to the Court should be made accordingly, and the defendant should be fully apprised of the terms of the final conviction before he moves for a writ of *certiorari*; and if a copy or the necessary information should be withheld, and the defendant thereby fail, he will not have to pay the costs occasioned by the justice's conduct. (b) We have, in the preceding volume, stated the course of proceeding expedient to be observed in cases of this nature, in order to induce the Court to award costs of the proceedings for *mandamus*. (c) In moving for a *mandamus*, it may be advisable to pray that in the mean time all proceedings on the conviction be stayed, so as to prevent any distress warrant or imprisonment in the mean time.

(z) *R. v. Commissioners of Excise*, 3 M. & S. 133; *R. v. Jeffery*, 1 B. & Cres. 654.

(a) *Ante*; 200, 201.

(b) *R. v. Medlam*, 3 Burr. 1720, *ante*, 200, 201, 212.

(c) *Ante*, Vol. 1, 806 to 810.

An *appeal*, we have seen, is a proceeding to obtain a re-hearing of the *merits*, and is in the nature of a new trial, though at a Court of *Sessions*, instead of before only one or two, usually not more than two justices; and we have seen, such appeal can only be had when *expressly* given; whereas a *Certiorari* is in the nature of a *writ of error* removing the conviction (and other proceedings in some cases) from before the justice or from the sessions, before or after the appeal, into the Court of King's Bench, where only objections and defects appearing upon the *face of the conviction* or in some stage of the proceeding can be discussed; and there cannot, in the Court above, be any re-hearing or investigation of the merits, though sometimes affidavits may be heard on each side as to extrinsic proceedings. (c)

It is an established general rule, that a *Certiorari* to remove a summary conviction on any reasonable ground into the Court of King's Bench, always lies as a matter of right, unless it has been *expressly* taken away; (d) and even where a statute authorizing a summary conviction before a justice gave an appeal to sessions, who were thereby also directed to hear and *finally determine* the matter, it was nevertheless held that these words merely prohibit a re-investigation of the *facts*, and that after the determination of the appeal, the party convicted might remove the conviction by *certiorari*; and Lord Kenyon observed that he thought it was much to be lamented, in a variety of cases, that a *certiorari* was taken away at all. (e) The present legislative policy appears from the 9 Geo. 4, c. 31, 7 & 8 Geo. 4, c. 29 and c. 30, and 1 & 2 W. 4, c. 32, to be to take away the writ of *certiorari*, but to allow *an appeal*, on the principle that the latter affords a re-investigation of the *merits* before a Court of General Quarter Sessions, who are supposed to be incapable of deliberate injustice, and who may, as regards any question of law, state a case for the opinion of the Court of King's Bench, and which are adequate opportunities for all fair investigation; and that the writ of *certiorari* is generally a proceeding only to give effect to objection to the form of proceeding. If a statute contain such comprehensive terms as to prohibit the *removal* of any order, matter, or *thing*, the latter word seems to comprehend every act whatever. (f) If a conviction contain an adjudication for *several* penalties, any one of which is removable by

(c) *R. v. Reason*, 6 Term R. 375; *R. v. Jukes*, 8 T. R. 542. As to the rejection of a competent witness, *R. v. —*, 2 Chitty's R. 137.

(d) *R. v. Moreley*, 2 Burr. 1040; and per Lord Kenyon, C. J.; *R. v. Jukes*, 8

T. R. 544, 5; *R. v. Cashlobury*, 3 Dowl. & Ry. 35.

(e) *Id. ibid.*

(f) *R. v. Middlesex*, 8 Dowl. and R. 117.

certiorari, then the whole conviction is removable, (g) and the Crown is never, by general words in a statute, deprived of this writ. (h)

Where, however, the intention of the Legislature to take away that writ is apparent, though only by implication, then such intention must be given effect to; (i) and when a statute *expressly* takes away a *certiorari*, and the justices have ventured to frame their conviction so formally and sufficiently as upon the face thereof to bring the particular case within their jurisdiction, and unjustly or erroneously to convict, then although from positive affidavits it may be made appear that the *facts* did not justify the conviction, or that they had not any jurisdiction, (and although it is an acknowledged principle that justices cannot give themselves jurisdiction by stating a different offence from that which came before them,) yet Lord Tenterden and the Court held that the statute took away their power to issue a *certiorari* to remove the conviction, or the proceedings or depositions on which the same were founded. (j)

In such a case, and where facts are falsely assumed, the only course is, upon *full affidavits* of the real evidence and defence before the justices, to move the Court of King's Bench for a rule to show cause why a *mandamus* should not issue, commanding them to set out the evidence and defence pursuant to the 3 Geo. 4, c. 23, (k) (but which only applies when no other more succinct form of conviction is allowed by any particular statute,) or if the justice acted wilfully in mistating the evidence to institute criminal proceedings.

It has been suggested, that the Court might prohibit any proceedings upon a conviction, although it might not be removable by *certiorari*; at least, Holt, C. J. said, that upon affidavits on the part of a defendant of a *bonâ fide* defence on the ground of title, and that the justice would not allow any effect to the same, but wilfully persisted in proceeding to convict, the Court of King's Bench might, at any time whilst the conviction remained below and had not been removed by *certiorari*, issue a writ of prohibition after conviction, so as to stay the justice from proceeding to enforce it. (l) And in a case under the General Highway Act, 13 Geo. 3, c. 78. s. 90, which expressly

(g) *R. v. Saunders*, 5 Dowl. and R. 611.

(h) *R. v. Anon*, 2 Chitty's R. 136; 5 T. R. 542.

(i) *R. v. Liverpool*, 3 Dowl. and R. 275.

(j) *Anonymous*, 1 B. & Adolph. 382.

(k) *Ante*, 200, 201.

(l) 2 Lord Raym. 901; and see *Crepps v. Darden*, Cowp. 640, and the note in 1 B. and Adolph. 386 (a).

takes away a *certiorari*, it was held that the same did not extend to cases where the justices at sessions had acted wholly without jurisdiction; and therefore where the justices at petty sessions had made an order for the allowance of the accounts of a surveyor of highways which had not previously been verified before one justice, pursuant to the requisites of the 38th section of the act, it was held that they acted wholly without jurisdiction, and that their order was not a proceeding *had pursuant to the act*, and that consequently a *writ of certiorari* lay to remove it into the Court of King's Bench, for the purpose of having it quashed; (m) but this seems to be contrary to the usual terms of the enactment, taking away a *certiorari* or *any other* proceeding. (n) And in another case under the same Highway Act and session, where an order was made by two justices and confirmed by the sessions for diverting a road, professedly under the authority of, but (as was alleged) without pursuing all the formalities required by the act, it was held that the *certiorari* was still taken away; and after the proceedings had been in fact removed, the Court quashed the *certiorari*, *quia improvide emanavit*, and refused to discuss the sufficiency or insufficiency of the order. (o)

Sometimes the statute creating the offence is construed, from its terms, to give either an appeal or a *certiorari*, though not before, and that after adopting one proceeding the party could not resort to another; (p) whilst other acts enable a convicted person to adopt both successively within due time, though not both at the same time. In such a case the proper course in general is to appeal in the first instance, and after affirmance to proceed by *certiorari* to reverse the conviction for some defect upon the face of the same.

The general act, 13 Geo. 2, c. 18. s. 5, imposes several terms and restrictions before a conviction can be successfully removed by *certiorari*. Thus the writ must be moved for *within six calendar months* next after the conviction, and exclusive of the day of its date; (q) nor can the writ be issued until it has been sworn that the party suing out the same hath given *six days' notice* thereof *in writing* to the justice or justices who convicted him, to the

Time within which certiorari must be moved for, and notice thereof required.

(m) *R. v. The Justices of Somersetshire*, 3 Dowl. and Ry. Mag. Cases, 273.

(n) It is, however, the practice of the Court of K. B. where there has been an unjust or doubtful acquittal of a defendant on an indictment relative to a highway, to stay the judgment, so as to prevent any prejudice, and allow the prosecutor ano-

ther opportunity to convict, though they could not grant a new trial where there has been a verdict for the defendant.

(o) *R. v. Casson*, 3 D. and Ry. 36.

(p) *R. v. Eaton*, 2 T. R. 89.

(q) 13 Geo. 2, c. 18, s. 5; *R. v. Boughey*, 4 T. R. 281.

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

end that the latter may show cause against the issuing or granting such *certiorari* in the *first* instance, and upon the motion that it may be issued. If the party have appealed to the sessions against a conviction, he cannot move for a *certiorari* before the Court of Sessions have heard and determined the appeal. (s)

Notice of motion for *certiorari* to remove conviction, and affidavit of service thereof.

The notice of motion must contain a statement on whose behalf the motion is intended to be made, and should be signed *by such party*, and of course must usually be the party who has been convicted; (t) and a *certiorari* cannot be issued at the instance of any party who did not sign the notice, although that party has avowedly dropped the proceeding, and it is also too late to give a fresh notice; (u) and a notice to justices of a motion to be made for a *certiorari* "on behalf of the church-wardens and overseers of S.," if signed only by one church-warden, is not a sufficient notice "by the party or parties suing forth" the writ within the statute, 13 Geo. 2, c. 18. s. 5. (v) If two or more persons have been convicted, then all should concur and sign the notice; (w) and the service of a rule *nisi* for the issuing of a *certiorari*, although more than six days be thereby given to show cause, will not dispense with the notice; (x) and such notice is requisite, although the Court of Sessions has ordered a case to be stated for the opinion of the Court of King's Bench. (y).

In order to support the motion to the Court for the writ, there must always be *an affidavit* of a due service of the notice, upwards of *six days* before the day of moving; (z) and if in truth the service was defective, that may be shown in answer to the motion, and until the requisition of the statute has been complied with; (a) and even where a rule *nisi* for a *certiorari* has been made absolute, and the writ had issued, the Court afterwards set aside the same upon its being established that no sufficient notice had been given. (b) The affidavit should be entitled "In the Court of King's Bench," but not in a cause. (c)

(s) *Semble, R. v. Sparrow*, 2 T. R. 196.

(t) *R. v. Lancashire*, 4 B. and Ald. 289; see *post*, 223, note.

(u) *R. v. Justices of Kent*, 3 B. and Adolph. 250.

(v) *R. v. Justices of Cambridge*, 3 Bar. and Adolph. 887.

(w) *Semble, sed quære, R. v. Cambridgeshire*, 3 B. and Adolph. 887; see *R. v. Hunt and others*, 2 Chitty's Rep.

130.

(x) *R. v. Glamorganshire*, 5 T. R.

279.

(y) *R. v. Sussex*, 1 M. and S. 631.

(z) *Ex parte Nohro*, 1 B. and Cres. 267.

(a) *R. v. Glamorganshire*, 5 T. R. 279.

(b) *R. v. Nichols*, 5 T. R. 281.

(c) 1 Bar. and Cres. 267; see 2 Stra. 704.

It is advisable, although not apparently expressly required by any enactment, to specify in the notice all the then discovered grounds of objection to the conviction, in the same explicit manner as required in notices of *appeal* against a conviction or against a poor rate assessment. The form of the notice may be as in the note. (d)

Besides the affidavit of the service of the notice of motion, it is usual, even when a sufficient objection appears on the face of the conviction, to prepare a short affidavit (intituled in the Court of King's Bench, but not in a cause, (f) of what the party convicted believes it contains, and of the objectionable points, and (when the facts will justify) of the partiality or irregular expressions or conduct of the convicting justice; and if a copy of a defective conviction has been obtained, it may be annexed and verified by the affidavit. In general, the only objections that will be noticed by the Court, will appear on the face of the conviction; and with respect to those, it would suffice merely to identify the conviction; but sometimes there are also *extrinsic* objections to which the Court might attend, and which in that case should be fully stated in the affidavit; as where the evidence has been improperly omitted, or stated too

Affidavit in support of motion for certiorari.

(d) To *I. K.* and *L. M.*, Esquires, two of His Majesty's justices of the peace in and for the county of ———, and also to *A. B.*, the complainant and informer in the conviction hereunder specified.

Notice, pursuant to 13 G. 2, c. 18, of an intended motion for a certiorari, to remove a conviction. (e)

Whereas you the said *I. K.* and *L. M.* did, on the ——— day of ———, in the year of our Lord ———, convict me, *C. D.*, for that, &c. [*here state the whole conviction in its very terms*]. And whereas upon hearing of the complaint and information upon which the said conviction was founded, it was duly sworn and proved, upon the oath of ———, a credible witness, that, &c. [*here state the substance of what he swore*]; and whereas there is not, in pursuance of the statute in that case made and provided, any statement in the said conviction of the said evidence; and whereas you also wholly refused to hear the evidence of *G. H.*, a credible witness on my behalf; and your proceedings on the hearing, and your said conviction, were and are irregular and illegal in other respects; wherefore I, the said *C. D.*, have resolved to seek a remedy for the injury which I have received and sustained, and am like to receive and sustain, by means of the said conviction: now I do hereby, according to the form of the statute in that case made and provided, give you and each of you notice, that His Majesty's Court of King's Bench will, in six days from the time of your being served with this notice, or as soon after as counsel can be heard, be moved on my behalf for a writ of *certiorari* to issue out of the said Court, and to be directed to you the said justices [*or if it has, by appeal, become a record of sessions, say, "to the proper officer of the quarter sessions of the peace," or otherwise to the justices in whose possession it ought to be*] for the removal of the record of the said conviction, and all the proceedings upon which the same was founded, and relating to the same, into His Majesty's said Court of King's Bench. Dated this ——— day of ———, A. D. 1834.

C. D. (*).

(e) See a form, *R. v. Cambridgeshire*, 2 B. and Adolph. 887.

the statute requires the party himself to sign the notice; see *R. v. Cambridgeshire*, 3 B. and Adolph. 687.

(*) Sometimes the notice is signed by an attorney for his client; but *semble*,

(f) 1 B. and Cres. 267.

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

generally, (g) or where a conviction was for selling otherwise than by Winchester measure, and where a *certiorari* was allowed, because the justice had refused to hear a competent witness for the defendant, viz., the vendee; (h) and when the ground is that the justices had not jurisdiction, the objection must in general be explicitly established by affidavit. (i) The following form of affidavit would suffice. (k)

The grounds on which the Court will grant or refuse a writ of *certiorari*.

It will be obvious from some of the foregoing observations of the Judges, that they favour the general jurisdiction, to issue writs of *certiorari* for the removal of convictions, unless their power has been expressly taken away; because, under colour of magisterial authority, it has too frequently happened, that convictions have taken place without just grounds, especially those under the Game laws; and that consequently it is desirable that such proceedings should be examinable by the superior Courts. On the other hand, the Court in the exercise of their discretionary jurisdiction, will not interfere to suspend or investigate the sufficiency of summary proceedings before a justice or justices, unless it appear that there is some substan-

(g) 3 Geo. 4, c. 23.

(h) *R. v. ———*, 2 Chitty's R. 137.

(i) *R. v. Long*, 1 Man. and Ry. 139.

See also *Anonymous*, 1 B. & Adolph. 382.

Form of affidavit in support of application for a *certiorari*, stating facts and objections, and also swearing to service of the notice of motion.

(k) In the King's Bench.

E. F., of ———, in the county of ———, attorney at law, maketh oath and saith, that by the desire of *C. D.*, labourer, of the parish of ———, in the county of ———, he did, on or about the first day of November last, apply at the house of *I. K.*, of ———, one of the justices of the peace for the county of ———, for a copy of the conviction of the said *C. D.*, made by the said *I. K.* and *L. M.*, Esquires, as two of His Majesty's justices of the peace for the said county, for having, as this deponent hath heard and believes, on the ——— day of ——— last, at the parish of ——— in the county of ———, &c. [*here describe, as explicitly as the facts will warrant, the supposed charge in the conviction*] as contrary to the form of the statute in that case made and provided whereby the said *C. D.* had forfeited and become liable to pay the sum of ———*l.*; and this deponent saith, that on such application as aforesaid, a paper writing, purporting to be a copy of the conviction of the said *C. D.* as aforesaid, was delivered to this deponent by the said *I. K.*, a true copy of which said paper writing is hereunto annexed, and is, as this deponent verily believes, a true copy of the original conviction of the said *I. K.* and *L. M.*; and this deponent further saith, that he this deponent is advised and verily believes, that in the information on which the said conviction was founded, and also the subsequent proceedings thereon, and the same and said conviction are defective and insufficient in substance, and wholly invalid, and the said conviction omits the statement of very material evidence given on the behalf of the said *C. D.* before the said justices, relating to the said information, and that the said conviction, on the face thereof, is altogether illegal and void; and this deponent further saith, that he did, on the ——— day of ———, deliver to the said *I. K.* and *L. M.* [and also to *A. B.*, the complainant and informer described in the said conviction, three several notices, respectively signed by the said *C. D.*, and a copy whereof is hereunto annexed, stating therein that he the said *C. D.* did intend to move this honourable Court on the first day of Hilary Term next, or so soon after as counsel could be heard, for a rule to shew cause why a writ of *certiorari* should not be issued to remove the said information and conviction, and all proceedings relating thereto, into His Majesty's said Court of King's Bench.

Sworn, &c.

E. F.

tial objection to the conviction, or such a defect in form that would become dangerous to tolerate or sanction as a precedent. The 3 Geo. 4, c. 23, s. 3, we have seen, aids all *formal* objections where the defendant has appeared and pleaded, and not objected to the same on the hearing; but where the defendant has not pleaded as well as appeared, the statute does not aid. In practice, when the formal objection is aided, the Court of King's Bench will not grant a *certiorari*, unless some substantial defect be suggested; but otherwise, and when by the conviction or affidavit, even a formal defect be pointed out, it is of course to allow the writ, which only brings the conviction before the Court for more formal discussion. The Court has certainly a *discretionary* power and control over the writ, and they will in general require it to be shewn, that some injustice has been done by the convicting justice. (*l*) A defect of jurisdiction, if clearly shewn, is a sufficient cause; (*m*) or the rejection of an admissible witness for a defendant; (*n*) and there are innumerable instances of removal by *certiorari* of convictions, invalid for such informalities as have not been aided by the 3 Geo. 4, c. 23, or other enactment or circumstance.

Immediately after obtaining leave to issue the *certiorari*, the party who issues the same must acknowledge a recognizance in 50*l.* with two sureties. The 5 Geo. 2, c. 19, s. 2, enacts, "that unless the party prosecuting the *certiorari*, and two sureties, enter into a *recognizance* in the sum of 50*l.* each, conditioned to prosecute the *certiorari* at his own proper costs and charges with effect, without wilful or affected delay, and to pay the amount of the adjudication in case of *confirmation* within one month afterward, then the justice or justices may proceed to enforce the conviction, as if the writ of *certiorari* had not been allowed." The defendant, as well as each of the sureties, must respectively be bound in the sum of 50*l.*, and 25*l.* for each of the sureties will not suffice. (*o*) If there be several defendants, and all do not enter into the requisite security, it seems to have been doubted whether the recognizance of one of the parties and his sureties will enable him to prosecute a *certiorari*. (*p*) No party can require the convicting justice to make his return of the conviction, until after he has duly entered into the requisite recognizance. When

Recognizance to prosecute *certiorari* with effect, and pay penalty and costs in case of affirmance.

(*l*) *R. v. Bass*, 3 Term R. 252.

(*m*) *Id. ibid.*; *R. v. Long*, 1 M. & R. 159.

(*n*) *R. v. ———*, 2 Chitty R. 137.

(*o*) *R. v. Boughey*, 4 T. R. 281; *R.*

VOL. II.

v. Dunn, 8 T. R. 217.

(*p*) Hawk. B. 2, c. 27, s. 50; Com. Dig. *Certiorari*; *Kent v. Goldshaw*, 7 B. & Cres. 525; 1 Man. & Ry. 305, S. C.

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

under the now repealed game laws, a bond was required instead of a recognizance, it was even doubted whether the bond must not have been executed before the motion for a *certiorari* was made. (q)

Of affirmance,
or quashing
the conviction
in K. B.

When the record of the conviction has been returned, its validity is brought under formal discussion, by the case being inserted in the crown paper, and argued on certain days called crown paper days, in due order, as the same stands in such paper. If the conviction be affirmed, then the defendant under the terms of his recognizance will have to pay the costs, unless, as we have seen, he has been induced to remove it in consequence of the magistrate's refusal to give him a copy. (r) Where the Court find that the sessions have quashed a conviction for a supposed defect in form, without hearing the appeal on the merits, and their order was removed by *certiorari*; the Court of King's Bench being of opinion, that there was not any defect even in form, quashed the order, and sent back the case to the sessions, to enter continuances and hear the appeal on the merits. (s) If the Court of King's Bench should quash the conviction, the defendant is entitled to have his recognizance or his bond discharged; but he cannot recover any costs upon a decision in his favour on a writ of *certiorari*, though we have seen that if he succeed at the sessions on *an appeal*, he is entitled to his costs. On first view it may seem unjust, that a defendant who has been harrassed by the vexatious proceeding, should not have any means of recovering his costs from the informer, as well for proceedings by *certiorari* as appeal, when he ultimately succeeds: the reason for the distinction is, that on the *appeal* the defendant succeeds on *the merits*, and therefore ought to have his costs from the complainant; but when he succeeds on a *certiorari*, it is probably on account of the inaccuracy of the justice, and for which it might be hard to make the informer pay. It is however of little avail to attempt to assign reasons for the distinction, and sufficient to know that the law is thus positively settled.

Execution to
enforce a con-
viction after it
has been
affirmed.

In general when a conviction has been affirmed, it is the course to enforce payment or execution, by an appropriate execution out of the Court of King's Bench. (t)

(q) 8 T. R. 218.

(r) *R. v. Midland*, 3 Burr. 1720.

(s) *R. v. Ridgway*, 5 B. & Ald. 527.

(t) Lord Raym. 768; 1 Salk. 378; Carth. 231.

The general rule is, that if a party *bona fide* supposing that he has a well founded charge against another, and not taking the law into his own hands, by *himself* apprehending the party or causing others to do so, goes before a Justice of the Peace, who is supposed to know the law, at least as regards his own jurisdiction, and states the facts according to the best of his knowledge, and *without malice*, then he is not liable for any imprisonment or other annoyance, to the party under the *subsequent* proceedings authorized by the justice, although it finally appear, that in truth the charge and proceeding was wholly unfounded; for otherwise men would be deterred from bringing forward charges of a criminal nature, which, although less than felony or indictable misdemeanor, it may nevertheless be important to have prosecuted; and though the proceeding would necessarily occasion some trouble, if not positive injury to the party, yet the complainant having to pay costs *pro falso clamore*, is considered adequate punishment. (v) This was always the doctrine as to unfounded *civil* suits, unless where the proceeding had unnecessarily been by vexatious *arrest*. (w) But if a party *maliciously* without reasonable cause, obtain a search warrant or other process against the person or goods of another, and thereby occasion inconvenience or expence, he will be liable to a special action on the case for his malicious imputation and all its natural consequences. (x) Thus where a person having lost a bill of exchange, which he supposed to have been stolen, went before a magistrate and correctly stated the circumstances of the loss, and thereupon the justice issued his warrant to apprehend *A. B.* on a charge of having "*feloniously* stolen, taken, and carried away" the bill of exchange, (language which the complainant did not use when he laid his information), and upon subsequent investigation of the case, it turned out to be no felony; it was held that no action on the case could be supported against the accuser for *maliciously* procuring the magistrate to grant his warrant, because to sustain the averment of malice, the charge must have been wilfully false. (y) So where a party, under the Wilful and Malicious Trespass Act, before a justice, charged his tenant with cutting down a tree on the premises occupied by him as tenant, which was the fact, but the justice having erroneously considered this act

(v) *Ante*, 207 ; 18 Geo. 3. c. 19.

(w) 1 Salk. 14.

(x) *Cohen v. Morgan*, 6 Dowl. & R. 8 ; *Mills v. Collett*, 6 Bing. 85 ; *Elce v.**Smith*, 1 Dowl. & R. 97 ; 2 Chit. Rep. 304, S. C. ; *Hensworth v. Fowkes*, 4 B. & Adolph. 449.(y) *Id. ibid.*

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

to be a *felony*, and committed the tenant to prison as a felon ; it was held, that the landlord was not liable to any action for such illegal imprisonment by the justice. (z) But where the defendant maliciously stated, without any reasonable ground for so doing, that he suspected that the plaintiff had feloniously stolen and concealed wood on his premises, and thereby induced the justice to issue a search warrant ; it was held that such groundless accusation subjected the accuser to an action on the case, although as the warrant was illegal, the magistrate was liable to an action of trespass. (a)

Liabilities of
justice. (b)

The *liabilities* of justices and inferior officers, and their *protections*, constitute very frequent subjects of legal discussion. A mere warrant or conviction, *not acted upon* or enforced against the person or property of another, not being actually prejudicial, could not be the subject of complaint ; but when *without or beyond* the justice's *jurisdiction*, he *irregularly* causes the property or person of another to be imprisoned, then the justice is liable to an action ; generally of trespass, but after a conviction has been quashed, then an action on the case, as presently stated.

The principal instances of illegal proceedings before conviction, where a justice, or inferior officer, is liable to an action, are cases of apprehension of a party without a sufficient *oath* of a crime or offence having been committed ; (c) or where a constable has, after apprehension, neglected to take the party before a justice within a reasonable time ; (d) or where a justice has kept a party in custody too long, under pretence of re-examination ; (e) or has before conviction been guilty of any other unauthorized act, (f) or has committed a person as a vagrant without personally hearing the witnesses in the presence of the party. (g)

After conviction, a justice was always considered liable if he issued a *commitment* for a different offence than that expressed in the conviction, (h) or where the commitment did not show on the face of it a sufficient conviction. (h) We have, however, seen that the four late acts, 9 Geo. 4, c. 31, s. 36, 7 & 8 Geo. 4, c. 29, s. 73, *id.* c. 30, s. 39, and the Game Act, 1 & 2 W. 4, c.

(z) *Mills v. Collett*, 6 Bing. 85 ; 2 Man. & Ry. Mag. Cases, 262.

(a) *Elsee v. Smith*, Chitty's R. 304.

(b) See also some of the instances of liability and non-liability of justices, 1 Chitty on Pleading, 89, 90, 209 to 215.

(c) *Morgan v. Hughes*, 2 Term R. 225 ; but see *Mills v. Collett*, 6 Bing. 85.

(d) *Ante*, 1 Vol. 633.

(e) *Ante*, 178, 9.

(f) *Id.* *ibid.*

(g) *R. v. Constable*, 7 Dowl. & Ry. 663.

(h) *Wickes v. Chutterbuck*, 2 Bing. 483 ; *Rogers v. Jones*, Ry. & Mood. 129 ; 2 Dowl. & Ry. Mag. Cases, 429.

32, s. 45, expressly enact, "that no warrant of commitment shall be held void *by reason of any defect therein, provided it be therein alleged that the party has been convicted, and there be a good and valid conviction to sustain the same.*" And it has been held, that although these acts prohibit the removal of the conviction by *certiorari*, yet in support of a commitment the contents of the conviction may be ascertained by obtaining a verified copy of the same. (i) But except in these protected cases, if the warrant, either to seize goods or illegally detain the person, be defective, the justice may be sued, and usually in trespass.

Sometimes also a justice may be liable in *trespass*, because the *facts* did not bring a case within the statute on which he has proceeded, as the statute giving summary jurisdiction over particular servants working for wages, but not over persons working by *contract*; and if he should commit the latter, it would be false imprisonment, (k) because the *facts* did not warrant his interference; as where the justice granted a warrant to distrain on a party who had no land in the parish, (l) or convicted a party for not doing statute duty in consequence of his supposed occupation of lands within the parish which he did not occupy; though it would be otherwise, if he merely relied upon a personal exemption, which he ought to have established before the justices antecedent to conviction. (m)

But when a conviction is legal, and sufficient on the face of it, and the warrant of commitment or distress or other execution thereon is not in itself defective, then unless the conviction has been quashed, it constitutes a complete defence and protection to the justice for any thing done upon it, however irregular or unjust the conviction may have been as regards the merits; (n) so that if a justice should take care to draw up a formal conviction technically correct, although quite contrary to the merits, it cannot be impeached in an action of trespass, and he may thereby protect himself from liability to any action, and could only be proceeded against by *mandamus* to compel him to *reform* his conviction, or by criminal information if his conduct should have been wilfully and grossly incorrect. (o) Thus where two magistrates having, at a landlord's request, given possession of

(i) *R. v. Mellor*, 2 Dowl. Prac. Rep. 173.

(k) *Lancaster v. Grenves*, 9 Bar. & Cres. 628; *Hardy v. Ryle*, id. 603; *Branwell v. Pennock*, 7 Bar. & Cres. 536.

(l) *Weaver v. Price*, 3 Bar. and Ad. 409.

(m) *Fawcett v. Fowles*, 7 B. and Cres. 394.

(n) *Ante*, 196, note (w); *Archcroft v. Brown*, 3 Bar. and Adolph. 684.

(o) *Fawcett v. Fowles*, 7 B. and Cres. 394.

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

a dwelling-house as deserted and unoccupied, pursuant to 11 Geo. 2, c. 19, s. 16, but afterwards the judges of assize, on appeal under that act, made an order for the restitution of the farm to the tenant, with costs, and the latter brought an action of *trespass* for the eviction against the magistrate and the constable and the landlord; yet it was held, that *the record of the proceedings* before the magistrates was an answer to the action on behalf of all the defendants, and not confined merely to the justices. (*p*)

Protection to
justices. (*q*)

The *general* acts, 7 Jac. 1, c. 5, 21 Jac. 1, c. 12, 24 Geo. 2, c. 44, (*r*) and 43 Geo. 3, c. 141, afford magistrates very considerable protection; and there are frequently local acts of the same nature. The 24 Geo. 2, c. 44, s. 8, requires the action to be brought within six calendar months, and, as we have seen, a calendar month's previous notice of action; (*s*) and during which the same act enables the justice to tender amends; or if he neglect to do so before the writ is issued, he may pay money into Court, (*t*) and this at any time, even just before the trial; (*u*) and the *venue* in the action must be laid in the proper county where the alleged injury was committed, and the defendant may plead the general issue, and give in evidence any ground of defence under that plea.

As regards the *form* of action, there is also a singular enactment in 43 Geo. 3, c. 141, s. 2, requiring that in an action against a justice for any thing by him done in endeavouring to enforce a conviction, *if such conviction has been quashed*, the *declaration* shall be in case for *maliciously* doing the act complained of, and that otherwise the plaintiff shall not recover more than two pence, nor *any* costs; the object of which enactment was to prevent the plaintiff, in case of a *quashed* conviction, from recovering against a magistrate, unless he proved that he acted not merely *illegally*, but also *maliciously*, and without reasonable or probable cause, and so as to prevent a party from succeeding in an action merely on account of an error in the justice's conviction. But the latter enactment is strictly confined to cases where a *conviction* has been *quashed*. (*v*) It should seem, therefore, that when a conviction, as well as a warrant of

(*p*) *Archcroft v. Browne and others*, 3 Bar. and Adolp. 684.

(*q*) See in general 1 Paley on Convictions, 18 and 19, in note.

(*r*) See statutes, *ante*, 1 Vol. 506, note (*a*); see *ante*, 63, as to notices of action to a justice.

(*s*) See *ante*, 63, &c. as to notice of

action.

(*t*) *Ante*, 1 Vol. 506.

(*u*) *Nestor v. Newcomb*, 3 Bar. and Cres. 159.

(*v*) *Massey v. Johnson*, 12 East, 67; *Gray v. Cookson*, 16 East, 13; *Rogers v. Jones*, Ry. and Mood. 129; 2 Dowl. and R. Mag. Cas. 429.

distress or commitment, are already substantially bad upon the face of them, and the justice has made an unlawful seizure or imprisonment under the same, the better course for the party convicted is *not* to proceed to get the conviction quashed, but to proceed at once in an action of trespass.

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

Supposing a justice has exceeded his jurisdiction by erroneously committing a party to prison, (as under the 3 Geo. 4, c. 71, called Martin's Act, against cruelty to animals, or any other statute for a supposed offence not within the statute,) the Court will discharge the party imprisoned upon *habeas corpus*, without imposing any terms whatever that no action shall be brought. (*w*)



Having thus fully considered the very usual summary proceedings before justices for conviction, we will now examine some of those proceedings by justices of a more limited nature, but yet occasionally called for and of considerable importance, especially those relating to *forcible entries and detainers*, and cases that arise between *landlords and tenants*, and which demand *immediate* remedy; and where the ordinary process of law would be either futile or too expensive, as where rent is in arrear and the premises are deserted, and no sufficient distress to be found; or where there has been a fraudulent removal of goods to prevent a distress; or where paupers have been permitted to occupy in that character, and afterwards refuse to give up possession; and on behalf of tenants upon whom distresses have been made, and excessive charges insisted upon.

OTHER SUM-
MARY PRO-
CEEDINGS

The right of Justices of the Peace to interfere in cases of *forcible entries and detainers* is of very ancient date; but as regards justices acting summarily, either separately or otherwise than with reference to an indictment at sessions or assizes, is entirely founded upon different *statutes*. At common law a party might always enter and take possession of his own house or land, though limited to twenty years by the statute 21 Jac. 1, c. 16, provided he could do so in a *peaceable manner*, and which was defined by an ancient statute, (5 Rich. 2, c. 8), "not with strong hand nor with multitude of people, but only in a *peaceable and easy manner*." But at common law as well as under the statute presently noticed, if a person took

THIRDLY, IN
CASES OF FOR-
CIBLE ENTRY
OR DETAINER.

(*w*) *Ex parte Hill*, 3 Car. and Pa. 225; and *ante*, 1 Vol. 689.

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

possession even of what was clearly his own property, with *strong hand* or in a *forcible* manner, he was indictable at the Court of Sessions or at the Assizes, because such *forcible entry* constituted in fact a breach of the peace, which was considered an offence to society which ought to be repressed; and it was always a maxim as regards the right to a house or building in particular, that although the owner might if the outer door were open, or even if shut, by any stratagem obtain possession in a *peaceable manner*, or if no person were therein, might even break open the outer door of a house and take possession of his own; (x) yet that he could not do so, when he could not effect that object otherwise than by *personal* violence, as by assaulting the occupier and turning him out, or going to the house (some person being therein), with several persons armed with fire-arms, swords, or other weapons of attack, and then attempting to force possession; because such a proceeding endangers the peace, and might occasion bloodshed; and the owner in such a case ought to wait the result of legal proceedings, and after recovering judgment therein, then a writ of *habere facias possessionem* might be issued thereupon, directed to the sheriff of the county, and whose duty would thereupon be to take the *posse comitatus*, and compel the delivery of possession; and if the occupier should thereupon resist, he would become criminally punishable for resisting the process of the law; and in case after the sheriff had put the owner into possession, the wrongdoer should return and retake possession shortly afterwards, without any new right of possession having accrued in his favour, then the Court would from time to time issue fresh writs to the sheriff, commanding him to re-deliver possession, and the party would also be committed for his contempt of the process of the Court. (y) So that a party, although clearly having the right of possession, would absurdly be guilty of dangerous precipitancy, if he should attempt to take possession by force, where there would be any risk of personal conflict, or of what would in law amount on his part to a forcible entry, and which would subject him at *common law* to an indictment for a forcible entry, and to the proceedings we will presently notice; and this, although he might really be entitled to the exclusive possession. (z) We have in the preceding volume

(x) So decided in *Turner v. Meymott*, 1 Bing. 158; 7 J. B. Moore, 574; *Taunton v. Costar*, 7 T. R. 431; 6 Taunt. 282; 8 Bar. and Cres. 4.

(y) Tidd's Prac. 9th ed. 1247; and

Doe d. Thompson v. Mirehouse, 2 Dowl. Prac. Rep. 200.

(s) *Ante*, 1 Vol. 375, 401, 646; 8 Term Rep. 299, 357.

suggested the best course of proceeding in ordinary cases, to regain possession of a house and land, and how a party may *safely act* in taking or retaking possession, without the assistance of a justice. (a)

CHAP. IV.
SUMMARY PROCEEDINGS, &c.

If it should appear that possession cannot be obtained without the risks to which we have adverted, then if the title be *legal*, an action of ejectment must be prosecuted; or if equitable, then a Court of Equity must be resorted to; and in the mean time, if it be apprehended that *waste or wasteful trespasses*, such as cutting trees, digging mines, &c., are about to be committed or repeated, then we have seen that a bill in Chancery should be immediately filed, and the Court moved, and within a few days an *injunction* to prevent injury may in general be obtained. (b)

Prevention of waste, pending legal proceedings.

But we are now to consider the very important summary jurisdiction of justices in cases of *forcible entry or forcible detainer*. This, we have seen, is founded entirely on the statute law, viz. 5 Ric. 2. c. 8, 15 Ric. 2. c. 2, 8 Hen. 6. c. 9, 31 Eliz. c. 11, 21 Jac. 1. c. 15; the latter of which principally extends the summary remedy to copyholders and tenants for years. The material parts of those acts are stated and commented upon in Burn's Justice, title Forcible Entry and Detainer; but as there are some observations in that in general accurate work, calculated to mislead, we will here take a concise view of at least some of the most important parts of this subject.

Jurisdiction of justices, in cases of forcible entry and detainer.

There are two descriptions of *forcible ousters*, which are perfectly distinct from each other, viz. 1st, a *forcible entry* and expulsion, with a continuance of similar force; and 2dly, a *forcible detainer*, where the previous entry was not forcible, but illegal. It would here be beyond our inquiry to consider who may or not be guilty of a forcible entry or detainer. The general rule is, that all persons *compos mentis*, and who might in fact commit any crime, may be guilty of this offence; and that consequently an infant, or even a married woman, (c) may be liable to be proceeded against summarily by a justice. But in general mere *subsequent assent* to a forcible entry, although for the party's use, would not subject him to such a criminal

(a) *Ante*, 1 Vol. 646, 7.

(b) See *Ex parte Clegg*, *ante*, 1 Vol. 723, 4, 726, 7.

(c) *R. v. Smyth and others*, Mood. and

Robinson's Rep. 155, and even by forcibly entering into her husband's dwelling-house.

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &C.

proceeding. (d) To constitute a forcible entry, or a forcible detainer, mere force *in law*, as it is technically termed, being a simple trespass, is not sufficient, but there must be some *actual violence*, or some proceeding, as a *large assembly of persons*, calculated to create *alarm*, if not *terror*, in ordinary minds, though it is not necessary that there should be any assault or battery. (e)

Forcible en-
tries, and forci-
ble detainers
after *such*
entries.

With respect to *Forcible Entries*, followed or not by continued forcible Detainer, all the above statutes apply. The 5 Ric. 2. c. 8, defines and prohibits forcible entries, and the 15 Ric. 2. c. 2, gives jurisdiction to one or more justices. It enacts, that one or more justices shall, *upon complaint*, (and which it seems may be by any one, though not aggrieved, (f)) go to the premises, “and if he or they *find* any that hold “such place forcibly after *such* (i. e. *forcible*) entry made, they “shall be taken and put to the next gaol, there to abide con- “vict by the record of the said justice or justices, until they “have made fine to the king;” and the statute requires all persons to aid and assist the justice in his proceeding. Under this act, and according to the present law, if the justice, when at the premises, do not actually have *view* of any *continuing* force, he *cannot proceed*; and supposing that the parties have been guilty of a previous forcible entry, but the continuance of force has ceased, it should seem that they can only be punished by indictment at the sessions or assizes, or a jury must be impannelled to try the *forcible entry* under the 8 Hen. 6. c. 9. s. 3. This may be collected from the terms of the act, 15 Ric. 2. c. 2, and from the authorities, which state that “if such offenders “being in the house at the coming of the justice shall make no “resistance, nor make shew of any force, then the justice himself “cannot arrest or even *remove* them at all upon such view,” (g) though if the force be found afterwards by the *inquiry of the jury*, under the 8 Hen. 6. c. 9. s. 3, then the justice may bind the offenders to the peace; and if they be gone, he may make his warrant to take them, and may after send them to the gaol until they have found sureties for the peace. (h) But this power of committing a party upon a subsequent finding, and otherwise

(d) Hawk. P. C. ch. 64, s. 24; Co. Lit. 199 b, 200 a.

(e) Hawk. P. C. ch. 64, s. 20, to s. 29; Comyn's Digest, title Forcible Entry, A. 3; *R. v. Wilton*, 8 Term Rep. 357; *Milner v. Macham*, 2 Car. and Pa. 17.

(f) Lamb. 147.

(g) Dalt. Just chap. 44; and see 8 Hen. 6, c. 9, s. 3, which implies that unless the justice *himself view* the force, he cannot restore possession.

(h) Dalt. Justice, ch. 44.

than upon the justice's own view, seems questionable. (i) If upon the justice's arriving at the premises, the doors be shut, and those within the house should deny the justice to enter, he may order an outer door to be broken open in his presence, and may enter to remove the force; (k) and if after such entry has been made, the justice shall find such force, he shall cause the offenders to be arrested, and shall also take away their weapons, it is said also their armour, and cause them to be appraised, and after to be answered to the King as forfeited, or the value thereof. (l)

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

If the justice himself should have *actual view* of the force *continued* in his presence, then he is to draw up within a reasonable time, his record, and fix a fine separately upon each offender, (m) and issue his warrant of commitment unless such fine be paid; (n) or unless the defendant traverse the force, in which case a jury is to be impannelled, and who must find the same original forcible entry, and the justice's view of its continuance. (n) If the defendant traverse the force, then until the jury have found their verdict confirming the finding of the justice, he is not to restore possession. (o) And before the jury, the party claiming restoration of possession would not be a competent witness. (p)

If there should be no continuance of the force in the view of the justice, then, as we have seen, he could not restore possession; and therefore it was found that many offenders took care to avoid all appearance of force in the presence of the justice, and thereby still maintained their possession, and ousted the party injured of his summary remedy. To prevent that injustice, the

Proceedings, in case there is no continuance of the force in view of the justice.

(i) Hawk. P. C. ch. 64, s. 8.

(k) Dalt. J. ch. 44.

(l) Dalt. Justice, c. 44. In a case fully advised upon, by Sir Vicary Gibbs and Mr. Serjeant Shepherd, where a *lessee held over* after he had forfeited his lease by several breaches of covenant, and was committing waste after notice of his forfeiture and demand of possession, an active justice of the peace for the county of Essex, with two regular constables, in strict observance of those opinions, went to the premises, and after stating that he was a justice of the peace for the county, and that the lease was forfeited, and the right to possession vested in the landlord, demanded admittance; and being refused, the justice then stated the substance of the enactment, subjecting persons guilty of a forcible detainer to fine and imprisonment, and giving power to a justice to deliver possession

to the landlord; whereupon a person from within stated they had fire-arms, and would use them if any attempt should be made to take possession. Upon which the justice ordered the constables instantly to force the outer door, which was done, and possession given to the landlord; and as all the persons within engaged to retire peaceably, the justice only took their recognizance to appear at the sessions.

(m) 2 Stra. 794; *R. v. Ellwell*, 2 Lord Raym. 1514; Paley, 190; *Leighton's case*, 1 Hawk. B. 1, ch. 64, s. 8; Dalt. ch. 44. Separate fines must be fixed, or the proceedings will be irregular.

(n) 3 Salk. 169.

(o) *Id.* *ibid.*

(p) *R. v. Williams*, 9 B. and C. 549; *R. v. Bevan*, R. and M. N. P. Cases, 242.

CHAP. IV. subsequent act, 8 Hen. 6. c. 9. s. 3 & 4, enacts, "And more-
 SUMMARY PRO- "over though such persons making such entry be present, or
 CEEDINGS, &c. "else departed before the coming of the said justices or jus-
 "tice, nevertheless the same justices or justice shall have au-
 "thority and power to inquire, by people of the same county,
 "as well of them as make such forcible entries, as also of them
 "that holdeth with force, and the jury shall find that the par-
 "ties had offended against the statute, then the justice shall
 "put them out, and restore the person forcibly disseised."

Forcible de-
 tainers.

2. *Forcible Detainers*.—Before the 8 Hen. 6. c. 9. s. 2, there was no summary remedy to obtain the restoration of possession, unless there had been a *forcible entry*; though in one case it was held that a peaceable entry during the short absence of the occupier, and then upon his quick return *excluding* him, was equivalent to a forcible entry. (q) But it was found that many cases of *forcible detention* occurred, which equally required summary legal redress; as where the parties who committed the forcible entry afterwards quitted, and either sold or peaceably gave up the possession to a different person, who entered; or a party intruded into land or buildings during the absence of the owner or occupier; or, as Hawkins supposes, where a lessee wrongfully held over after the expiration of his lease. It was formerly supposed, and it should seem correctly so, as respects a mere case of holding over, that cases of that description did not require such *immediate* summary assistance, because there had not been any *actual* breach of the peace committed by the present wrong-doer in taking possession, as in the case of a *forcible entry*, nor was his continuance in possession necessarily any actual breach of the peace by him; because, unless the true owner should himself attempt to resume possession otherwise than by legal process, no force would be *used*, even when arms were kept in the house by the party for the protection of the occupier, or even for forcibly retaining possession. The statute 8 Hen. 6. c. 9. s. 1, nevertheless, certainly principally having in view cases of forcible entry, and of the party guilty of it handing over the possession to a third person, after reciting, "and for that the said statute (alluding to the 15 Ric. 2. c. 2), doth not extend to entries in tenements in *peaceable* manner, and after holden with force; nor if the persons which enter with force into lands and tenements be removed and avoided before the coming of the justice, and that in

(q) 1 Russ. Crim. L. 287; Hawk. ch. 64, s. 26.

“ consequence many *wrongful and forcible entries* be made, &c.” (r) then enacts, “ that the statute shall extend to persons *holding forcibly*, and that upon complaint of the party *aggrieved*, the justices or justice shall cause the statute to be executed at the costs of such party *grieved*.” But this statute throughout appears to refer either to cases where a previous *forcible entry* had been committed by some one, or at all events to a case where the wrong-doer, alleged to be guilty of the forcible detainer, was at the *same time wrongfully and illegally* in possession, and the statute, s. 7 (afterwards enforced by 31 Eliz. c. 11. s. 2), expressly precludes the justices from acting, when the person forcibly detaining has been in possession continuously for three years.

The construction of this act in Burn's Justice, title Forcible Entry and Detainer, VI., has tended to mislead; for it is there laid down “ that even in cases of *forcible detainer*, the justice “ is, upon complaint of the party *grieved*, (*without any examining or standing upon the right or title of either party*), “ to take sufficient power of the county and go to the place “ where such force is made, and &c.” This position, in its application to *forcible entries*, is perfectly correct, because no man ought to assert a claim in so violent a manner; and in that case his right is not to be inquired into; (s) but in its application to a mere alleged *forcible detainer*, it is decidedly incorrect. If it were sustainable to its full extent, then if any party should think fit to claim the possession of a house in the lawful occupation of another, and the occupier, confident in his own just right, should refuse to deliver it, and actually defend the same, then any justice might be required to go to the place and request the occupier to give up possession; and if the latter should refuse to quit, and fasten all the outer doors, the justice might treat him as an offender, and fine and commit him to prison, and give possession to the claimant, although he had no pretence of title. This would be a most dangerous jurisdiction, especially if, as supposed by Dr. Burn, the justice is not to inquire or consider the right or title of either party; and yet, according to the doctrine referred to, a justice would be bound, without inquiring into the title, to turn out every person so exceedingly uncivil as not to quit instantly upon the justice's request. Neither could

(r) *Seemle*, that these and other words in 8 Hen. 6, c. 9, import strongly that the *principal*, if not the only object of the act, was to provide for cases where *originally* there had been a *forcible entry*. The authorities, however, have

given a more extensive construction, and apply to a lessee holding over; Com. Dig. Forcible Detainer, B. 2.

(s) Per Vaughan, B. in *R. v. Williams*, as stated in Dick. Sess. by Mr. Serj. Talfourd, 239.

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

it have been the intention of the Legislature to impose upon a justice the difficult office of deciding upon the title of either party; and if it was intended to permit interference in other cases than those where there had been originally a *forcible entry* by *some one* within three years, still it must at least have been intended to limit their jurisdiction to very clear and obvious cases of *illegal withholding* possession from the true owner.

It is, however, laid down also by Serjeant Hawkins, that there may be a forcible detainer, whether the entry were forcible or not, (*t*) and that if a lessee, after the end of his term, keep arms in his house to oppose the entry of the lessor, though no one attempt an entry; (*u*) or if a tenant at will should *detain with force* after the will has been determined, he will be guilty of a *forcible detainer*, and that so would a lessee resisting with force a distress for rent; or even, it is said, forestalling or rescuing the distress; (*v*) and it is also laid down, that if a mortgagor detain with force after the mortgage has become forfeited, that is a forcible detainer, though it is at the same time admitted that the mere denying possession in these cases would not amount to a forcible detainer. (*w*) It may be asked how is it certain, in the first two cases, that there may not have been a valid agreement for a new tenancy; or in the last, that the mortgagee had not agreed that the mortgagor should continue in possession as his tenant; and yet it is supposed that this is immaterial, and that the justice must proceed; and yet it is admitted, that at one stage of the indictment for a forcible entry, the continuance of the right of the prosecutor may be inquired into; and it is said that if such interest has ceased, the defendant may apply to the Court to quash a writ of restitution, or at least prevent its execution. (*x*)

In one of the most recent cases, it has been decided that at all events the 8 Henry 6. c. 9, was only intended to give a summary jurisdiction in cases of forcible detainers after an *unlawful entry*; and that a conviction by justices on that statute, merely stating *an entry* and a forcible detainer, not averring that such *entry* was *illegal*, was insufficient; (*y*) and Denman, C. J., said, “I cannot think that the Legislature meant that the act of a man in maintaining his own rightful possession with force against

(*t*) Hawk. P. C. ch. 64, s 22; Burn J. Forcible Entry and Detainer, iii.

(*u*) And see MS. case, *ante*, 235, note (*t*), where Sir V. Gibbs and Mr. Serjeant Shepherd were of opinion that the statute extended to a lessee holding over.

(*v*) Com. Dig. Forcible Detainer, B.

2; *sed quære*.

(*w*) Id. *ibid*.

(*x*) Burn J. tit. Forcible Entry and Detainer, V. 26th edit. ; 2 Vol. 797.

(*y*) *The King v. Oakley*, 4 B. and Adolph. 307; and 1 Nev. and Man. 58, S. C.; but see Cro. Jac. 19, 32, 151.

“ a wrong doer should authorize the justices to turn him out;” (z) and Parke, J. stated the inclination of his opinion to be “ that the statute only applied when the *original entry* was unlawful;” and he observed that it would not necessarily follow from that decision that the statute 8 Henry 6. c. 9, does not apply to the case of a tenant at will or for years holding over after the will has been determined, or the term expired, because the continuance in possession afterwards *may* amount in judgment of law to a *new* entry; and as to that point, he referred to Hawk. P. C., book 1. c. 64. s. 34. Taunton, J. expressed his opinion, that the statute Henry 6 only applies to a forcible detainer preceded by an *unlawful entry*; and Patteson, J. also considered that an *illegal entry* was essential, and that if the statute were not confined to such cases, the consequence would be that a person who had even two years rightful possession of land might be liable under any circumstance to be fined and imprisoned for forcibly maintaining that possession against a wrong doer. He also observed that there might be good reasons for confining the summary jurisdiction of justices to cases where there had originally been a *forcible entry*, for it might be hard to allow a man to be turned out of possession by so summary a course, for detaining with force that land to which he might be rightfully entitled. (a)

It will be observed, that in this case the judges abstained from deciding upon a case of a tenant *holding over*, or upon any case where the original entry was lawful, though the continuance in possession might, by a subsequent act, have become illegal. As in the latter case there probably would not have been any *actual breach* of the peace, but at most a civil injury, by withholding possession from the claimant, and the legality of which may be properly tried in an action, the case seems not to be properly within the *object* of the jurisdiction of justices; and as they are not in general competent to decide upon title to land or upon questions respecting the creation, construction, or duration of a lease or agreement or other contract relating to the possession of houses or land, it would be at least injudicious for justices to adopt summary proceedings, and more prudent to leave the parties to try the right in a civil action, and to confine the exercise of their summary jurisdiction to cases of *recent forcible entry, with continuing forcible detainer*; and even then not to interfere when there is reasonable ground to expect that the party in actual possession will sustain his right.

(z) Id. p. 311.

(a) Id. p. 313, 4.

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

Practical pro-
ceedings in
case of forcible
entry and de-
tainer.

Although the statutes give summary jurisdiction to *one* justice to act separately, yet it is more usual and most prudent for *two or more* to meet and concur, at least in all the judicial acts; and though one justice might certainly receive the complaint of the party aggrieved, yet it is preferable that both the justices should be present, especially as the subsequent record of the fine, when established in general, states all the proceedings to have been before two justices, and in the present tense. It is recommended that the complainant be sworn, and do afterwards upon such oath, make his statement of his own right to the estate very particularly, and also shew the circumstances of the alleged *forcible entry*, or at all events of some original *illegal* entry. It was on account of the complaint in the case of *Rex v. Oakley*, (*b*) not shewing in the conviction for a forcible detainer, that the original *entry* was either *forcible* or *unlawful*, the Court quashed the conviction. (*b*)

If after a strict enquiry of the complainant, it should appear *doubtful* whether there was any breach of the peace in the entry, or whether upon the merits the party in possession has not the better, or at least an equitable right to retain it, then the best course will be for the justices to dismiss the complaint, and leave the party to indict at the sessions, or try his right in an action of ejectment. But if a strong case of recent forcible entry, especially if attended with any aggravated circumstances of violence, should be *prima facie* made out, then the justices, as conservators of the peace, ought to act, and promptly so, and to go to the premises and demand admittance, and endeavour fully to ascertain the circumstances of the original entry, and also of the continuing detainer; and unless on his own view, he observe violence or threats of using arms to exclude the party recently expelled, or if the offenders be not present, then the justices should not act upon their own view, but if required by the complainant, should issue their warrant to the sheriff, to summon a jury from the neighbourhood forthwith; (*c*) and even for the next day or shortly afterwards, (*d*) to try whether the entry was forcible as well as the detainer. So if the justices should find the force on their own view, the supposed offenders may traverse such finding, tendering such traverse *in writing*, as a mere *verbal* denial will not suffice; and then a jury must be summoned and impannelled to try the force

(*b*) 4 B. and Adolph. 307; and 1 Nev. and Man. 58; *ante*, 238, 9.

(*c*) 8 Hen. 6, c. 9, s. 4.

(*d*) Dalt. Jus. Ch. 133. The party

traversing is to bear the costs of the trial of the traverse, and not the King or prosecutor.

and other material allegations; (e) and we have seen that no restitution should be awarded before the jury have found the force, unless the defendant should decline traversing. (f) The complainant, it should seem, would not be a competent witness to prove any part of his complaint, being interested in endeavouring to obtain restitution. (g) If the jury should find the force, then the justices are to give judgment thereon, and draw up a formal record of the whole proceeding; (h) and thereupon the same justices are to proceed to the premises and remove the offender, and put the prosecutor in full possession. (i)

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

If either the complaint or any proceeding thereon has been insufficient, or the justices have admitted improper evidence before the jury, so as probably to affect the merits of their decision; then, after six days notice of motion for a *certiorari*, that writ may be moved for, and obtained in the manner by which we have seen a *certiorari* may be obtained in ordinary cases. (k) The notice of the motion should state very explicitly all the objections to the proceedings; (l) and if it be apprehended that the justices will not faithfully return all the proceedings as they occurred, but will attempt to state them in an improved manner; then upon a special affidavit of the facts, a *mandamus* as well as a *certiorari* might be obtained, to compel them to return every stage of document and proceeding according to the facts. (m) If the Court of King's Bench should be of opinion against the sufficiency of the proceedings before the justices, they will then quash the conviction, and must as of course issue a writ of restitution. (n)

Certiorari to
remove conviction.

A few summary proceedings by the intervention of justices in favour of *landlords*, and one on behalf of *tenants*, remain to be considered in this chapter; and first the case of a tenant in arrear for at least half a year's rent, and who has deserted the premises and left them uncultivated or unoccupied, so that there is not adequate property thereon to satisfy the arrear. It will be obvious that an event of this nature requires some *speedy and summary* relief, for otherwise not only would there be an increased arrear of rent from an insolvent tenant, but also

FOURTHLY, IN
OTHER CASES
AS BETWEEN
LANDLORDS
AND TENANTS.

1. Justice's assistance, when rent in arrear, and no sufficient distress, and premises deserted or uncultivated.

11 G. 2, c. 19.
s. 16, 17; and
57 G. 3, c. 52.

(e) 3 Salk. 169.

(f) *Id.* *ibid.*

(g) *R. v. Williams*, 9 B. and Cres. 549; *R. v. Bevan*, Ry. and Mood. 242.

(h) Hawk. B. 1, c. 64, s. 58; Dalt. J. c. 133.

(i) Hawk. B. 1, c. 64, s. 50.

(k) *Ante*, 219 to 226.

(l) *Ante*, 223.

(m) *Ante*, 200, 201, 218, 220.

(n) *R. v. Jones*, 1 Stra. 474; Bac. Ab. Forcible Entry, G.

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

the premises would be continuously unproductive as well to the landlord as the tenant, and to the public, and the estate would rapidly become decayed or dilapidated, if not destroyed by intermediate waste or depredation; and therefore, although this is a jurisdiction by no means *properly* an incident to the office of a *conservator of the peace*, yet the Legislature, by 11 Geo. 2. c. 19. s. 16, (enlarged in some respects by 57 Geo. 3. c. 52,) authorized justices of peace in certain cases, presently particularly noticed, to give summary relief to the landlord whose property is in jeopardy; and this so expeditiously as to complete the object within fifteen days after the landlord's application to the justice, so as to place him in complete and indefeazable possession of the demised premises, the lease or tenancy being *ipso facto* thereby vacated, and the landlord immediately enabled either himself to occupy the premises beneficially, or to grant a fresh lease to a new tenant; subject only to an appeal, which is rather of a singular description, and certainly, as regards costs, in some respects of too limited a nature, viz. to the next judges of assize; or if in London or Middlesex, to the judges of the Court of King's Bench or of the Court of Common Pleas, who, if they should reverse the decision of the justices, may order restitution to the tenant, with *all his* expenses and costs to be paid by the landlord; or if they affirm the decision, then they are to award the *landlord's* costs, not *exceeding 5l.*, for the frivolous appeal. (o)

These statutes, however, only apply to a few cases of bad or unfortunate tenants, and only when the tenant holds lands, tenements, or hereditaments, at a *rack rent*, which we have seen is defined to mean a rent amounting to the *full* annual value of the tenement, or *near it*, (p). or by 57 Geo. 3. c. 52, "to a reserved rent that shall be three-fourths of the annual value of the demised premises at the least." It has been held that the term rack rent, as thus used in the former act, did not mean the rent *reserved*, but such a rent as the landlord and tenant might *fairly* agree upon, supposing the premises were vacant and unlet. (q) The expressions in these statutes, however, clearly denote that they are not intended to extend to tenancies in cases where the tenant has advanced a considerable premium upon the grant of the lease, or where there is but a small rent very unequal to the annual value of the property.

Before the 57 Geo. 3, it was considered that the recital in the 18th s. of the 11 Geo. 2. c. 19, imported that the jurisdiction of

(o) 11 Geo. 2. c. 19. s. 16, 17.

(p) As to what is rack rent, see *ante*, 1 Vol. 228.

(q) *Croker v. Fothergill*, 2 Bar. & Ald. 652; *ante*, 229.

justices should only extend to cases where there was a lease *expressly reserving a right of re-entry* in case of non-payment of the rent, and in effect only to give a summary remedy in cases where an action of ejectment could have been sustained. (r) But the 57 Geo. 3, removed that difficulty, by expressly extending the summary remedy to cases although no right of re-entry had been reserved, and to *all tenancies*; whether created by lease in writing or by parol, and although no right of re-entry in case of non-payment of rent had been reserved; and therefore the justices have jurisdiction in ordinary tenancies by parol from year to year, if half a year's rent be in arrear: and all that under the two statutes is now requisite to give justices jurisdiction, is "that the holding be at a rent of at least *three-fourths of the yearly value*, and that *half a year's rent be in arrear*, and "that the tenant has *deserted* the demised premises, and left the "same *uncultivated, or unoccupied* so that *no sufficient distress can be had to countervail the arrears of rent.*" Four circumstances must concur; 1st, a tenancy at not less than three-fourths of the annual value; 2dly, at least half a year's rent in arrear; 3dly, a desertion by the tenant; and 4thly, neither tender of the rent, nor a sufficient distress.

The practical course of proceedings under these acts is for the landlord to whom at least half a year's rent is in arrear, and where the annual rent was at least three-fourths of the annual value, to apply to two justices of the county having no interest in the premises, either in person or by his bailiff or receiver, and *request* them, usually in writing, to go to view the same, and which they are to do. It has been holden, that the landlord's request or complaint need not be on *oath*, nor do the statutes even require it to be in writing. (s) But justices are advised to require a *written* complaint on *oath*, stating all the requisites essential to establish and satisfy the justices that it is a fit and legal case for their interposition, viz. "that the premises were held "at a rent not less than three-fourths of the annual value; that "half a year's rent is in arrear after demand; and that the "tenant has deserted the premises, and that there is no distreignable property sufficient to pay the arrear." (t) It must have been intended by the Legislature, that all the facts essential

Practical proceedings.

(r) See an express decision to that effect in Woodfall's Landlord and Tenant, 2nd edit. 523; and see *Ex parte Pitton*, 1 Bar. & Ald. 369.

(s) *Basten v. Carew*, 3 Bar. & Cres.

649; 5 Dowl. & R. 558, S. C.

(t) See a form of *complaint* in Burn's Justice, title Distress, 26th edit. 1 Vol. 1044.

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

to establish the right of a landlord to this summary proceeding before justices, should be inquired into before justices as fully as before the judges upon an appeal; and therefore justices may and ought to insist on all the facts being established before them. (u) It is true that all the statutes, in *express terms*, require the justices, on their first view, "to affix or cause to be affixed" on the most notorious part of the premises, *notice in writing* "what day (at the distance of fourteen days at least) they will re- turn to take a second view of the premises;" and then it is only enacted that "if, upon such second view, the tenant or some person on his behalf shall not appear and pay the rent in arrear, or there shall not be sufficient distress upon the premises, then the justices shall put the landlord into possession, and that the lease, as to any demise, shall thenceforth become void." But *impliedly*, they have full jurisdiction to inquire into the full merits, and it would be advisable that they should do so.

The terms of the act seem only to authorize the application to justices where the tenant has *deserted* the premises, *as well* as that he has left the same uncultivated or unoccupied; and where the tenant or any part of his family remains in actual possession, it should seem that the case is not within the statutes. (v) Supposing *desertion* to be essential, it has been held that where a tenant ceased to reside on the premises for several months, and left them without any furniture or sufficient other property to answer the year's rent, that the landlord might properly proceed under the 11 Geo. 2. c. 19. s. 16. to recover the possession, although he knew where the tenant then was, and although the justices found a servant of the tenant on the premises when they *first* went to view the same. (w) But questions respecting *desertion*, and the terms "*or uncultivated or unoccupied*," greatly depend on their own particular circumstances. (x)

The statutes do not in express terms require the justices to inquire into the fact of *desertion*, for on the first view they are merely to affix the notice, and on the subsequent view, if the rent

(u) It will be observed that the case of *Ashcroft v. Bourne and others*, 3 Bar. & Adolph. 684, and the form of the Justice's Record, in Burn J. tit. Distress, 26th edit. 1 Vol. 1015, suppose that all the facts have been established before the justices.

(v) See the facts of the case in *Ashcroft v. Bourne and others*, 3 Bar. & Ad. 685.

(w) *Ex parte Pilton*, 1 Bar. & Ald. 369; but although the tenant was absent he carried on business in the King's

Road, Chelsea, and the house was in the course of painting and being rendered fit for the reception of an occupier; and therefore, although of counsel for the landlord, I considered the determination in that case, as respected *desertion*, to have gone *very far* in favor of the landlord; and see the next cases.

(x) The application of those terms were shortly discussed in *Basten v. Carrew*, 3 Bar. & Cres. 649, though not fully reported in that respect; see also *Ashcroft v. Bourne*, 3 B. & Adolph. 684, 5.

be not paid, and there be no sufficient distress upon the premises, the statutes require nothing more, and they are as a matter of course to deliver the possession to the landlord. But nevertheless it should seem that justices ought to inquire fully into all the facts essential to support the proceeding, and especially as to the *desertion*. (y) The forms of the landlord's request, the justices' first notice, and their final record, are given in Burn's Justice, title Distress, and may in general be followed.

The 17th section of the 11 Geo. 2. c. 19, provides, that the proceedings of the Justices shall be examinable *in a summary way* by the Judges, as we have previously stated; and which, as respects premises in Middlesex and London, are by motion to the Court, founded on affidavits for a rule to shew cause, and cross affidavits, and counsel arguing on each side. Upon such a motion, unless where the proceedings on the part of the landlord are clearly irregular, the matter very frequently terminates in a compromise, and the tenant's paying all rent in arrear and costs, and submitting to proper terms.

If the decision of the Justices in favor of the landlord, followed by their delivery of possession to the landlord, should be reversed, and possession be ordered to be restored to the tenant, he is not thereby enabled to sue the Justices, or others who acted under them, in trespass, or otherwise; for the Justices acted judicially, and the production of the record of their proceedings will in general afford adequate protection to them, and all acting under them, for every thing done in execution of their decision. (z) But although all persons so acting under the sanction of the Justices would be protected from an action of *trespass*, yet if a landlord or others should maliciously cause the Justices to give possession, when the facts did not justify that decision, then perhaps, after its reversal, he might, on general principles, be liable to an action *on the case*, for maliciously, and without probable cause, improperly instituting the proceeding. (a)

The next proceeding against tenants, in which Justices are authorized to interfere, are those of a *fraudulent removal* by an *immediate* tenant, to prevent a landlord from distraining. This is an injury remediable by action and penalty, under the 11 Geo. 2, c. 19; the 4th section of that statute also provides, that where the goods fraudulently removed shall not exceed the value of 50*l.*, the landlord or his bailiff, servant, or agent, on his behalf, may exhibit a complaint in writing against the offenders before two

Secondly,
Justice's assistance when rent in arrear, and there has been a fraudulent removal to prevent a distress. 11 G. 2, c. 19. s. 4, 5, 6, 7.

(y) *Ashcroft v. Bourne and others*, 3 B. & Adolph. 684.

Bar. & Adolph. 684.

(z) *Ashcroft v. Bourne and others*, 3 B.

(a) *Elsee v. Smith*, 2 Chitty's Rep. 304; and *ante*, 179, 180, 227.

CHAP. IV. Justices residing near the place of removal, or the place where the same were found, not being interested in the tenanted premises, and who are to summon the parties concerned, and all proper witnesses, and examine them and the facts upon oath or affirmation, and in a summary way determine whether or not the parties accused were guilty; and to enquire of the value of the goods fraudulently carried off or concealed; and upon full proof of the offence, they are then, *by order* under their hands and seals, to adjudge the offenders to pay double the value of the goods to such landlord, bailiff, servant, or agent, at such time as the Justice shall appoint. And in case of neglect or refusal to pay after notice, a distress warrant is to issue; and in default of distress, the offenders are to be committed to hard labour to the House of Correction, for six months, unless the money be sooner paid.

The 5th and 6th sections allow an appeal to the Sessions; and if a recognizance be entered into with one or two sufficient surety or sureties, then the order of the Justices is not to be executed pending the appeal.

Antecedent to any proceedings before Justices upon these clauses, it is necessary to examine the previous clauses of the same act, and the decisions thereon, to ascertain the legal meaning and object of the enactments; and these are given in notes to the statute. (c) In general, the removal must be by the immediate tenant, and not by a mere lodger, who is not to be considered guilty of a fraud in taking away his goods to escape from a distress for non-payment of rent properly due from another person, who has also, perhaps, received all sub-rent due to him; (d) and for the same reason, a creditor or purchaser, who has *bonâ fide* obtained or bought the goods from the tenant, is not within the act; (e) and to subject a third person to the proceedings before Justices, it must be shewn, not only that he assisted in the removal, but that he was privy to the fraudulent intention: (f) though in the case of a tenant, proof of his being privy to the removal would suffice. (g) But it is immaterial whether the rent was completely due, or only immediately becoming due at the time of the removal, provided the facts should establish an intention to defraud the landlord of his rent; for the words of the first clause speak of any removal to *prevent* the landlord from dis-

(c) Chitty's Col. Stat. 669, 670.

(d) *Thornton v. Adams*, 5 M. & S. 38; 2 Stra. 787.

(e) *Back v. Meats*, 5 Maule & S. 200.

(f) 8 Bar. & Cres. 537.

(g) *Lyster v. Brown*, 3 Dowl. & R. 501; 1 Car. and Payne, 121, S. C., overruling 3 Esp. R. 15.

training ; and a removal just before, or on a Quarter Day, may *as*, if not *more*, effectually *prevent* a distress upon the premises, as a removal after that day ; (*h*) and as the first section of this statute is in the alternative, *viz.*, fraudulently *or* clandestinely, it is not absolutely essential that the removal should have been secret or clandestine ; and provided it were clearly intended to prevent a seizure for the rent, it should be adjudged to have been *fraudulent* ; (*i*) and a removal, with the privity of the tenant, though not ostensibly *by* him, will make him a fraudulent remover ; (*k*) and the Justices may, in these cases, proceed, as may the Superior Courts, upon circumstances of suspicion, although not amounting to demonstration ; (*l*) and therefore, a removal off the tenanted premises, to a neighbour's premises, and out of sight, so that the landlord would have difficulty in finding the cattle, is within the mischief of that statute. (*m*)

The jurisdiction of justices under the 4th section, is *concurrent*, and not exclusive of the Superior Courts. (*n*) The practical course of proceedings by the express terms of the act, require a complaint in *writing*, but no oath of the offence, in the first instance, is necessary. (*o*) If the goods have been removed from one county into another, then the Justices of either have jurisdiction. (*p*) The Justices are, by the tenor of the act, to summon the parties and witnesses, and to examine the witnesses to facts, on oath in the presence of the complainant and defendants, as usual in case of other summary proceedings. (*q*) As regards the form of the Justice's adjudication, the act declares it is to be *an order*. Hence, it follows, that it need not, perhaps, have all the requisites of *a conviction* ; and it is said, that therefore the evidence need not be set forth as required in convictions ; (*r*) and, on that account, it was supposed in one case, that an adjudication in the disjunctive, that the offenders assisted in fraudulently removing *or* concealing goods, was valid ; (*s*) and although the penalty is to be double *the value* of the goods, yet it is not necessary to enumerate them in the order, though we have seen that in general in a

(*h*) *Furneaux v. Fotherby*, 4 Campb. 137 ; 2 Saund. 284.

(*i*) *Oppermens v. Smith*, 4 Dowl. & R. 53 ; and other cases, Chitty's Col. Stat. 669, note (*k*).

(*k*) *Lyster v. Brown*, 3 Dowl. & R. 501 ; 1 Car. & P. 121. S. C.

(*l*) *Stanley v. Wharton*, 9 Price, 301 ; 10 Price, 138.

(*m*) *Stanley v. Wharton*, 9 Price, 301.

(*n*) *Horsfall v. Davy*, Holt's C. N. P. 147 ; 1 Stark. 169, S. C.

(*o*) *R. v. Bissax*, Sayer R. 304, and Burn J. tit. Distress.

(*p*) *R. v. Morgan*, Caldecott, 156.

(*q*) *Ante*, 182 to 192.

(*r*) *R. v. Bissax*, Sayer R. 304.

(*s*) *R. v. Middlehurst*, 1 Burr. 399 ; and see *The King v. Rabbitts*, 6 Dowl. & R. 341.

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

conviction it would be otherwise. (t) But the safer and more judicious course in all these cases, is for Justices to draw up their *orders* with the same precision and particularity as we have seen are essential in *convictions*. (u) The form of a declaration for a fraudulent removal, shews the necessary allegations and statements in the order; (v) and the usual proceedings are published in Burn's Justice, which may, at least, assist in preparing the requisite form, but should never govern. (w)

Oath and warrant to authorize the breaking a *dwelling house* to seize goods fraudulently removed there, to prevent a distress for rent under 11 G. 4, c. 19. s. 7.

In connection, also, with cases of fraudulent removal, Justices of the Peace are, under the 11 Geo. 2, c. 19. s. 7, on the application of a landlord or lessor, or his steward, bailiff, or receiver, to administer an oath, "of a reasonable ground to suspect that *such* goods or chattels (that is, goods previously *fraudulently removed* to prevent a landlord from distraining for an arrear of rent, as previously prohibited in the statute; (x)) are in a *dwelling house*," so as thereupon, in the day time, to authorise the constable, or other peace officer of the hundred, borough, parish, district, or place, where the goods are suspected to be concealed, *in aid* of the landlord or other party applying, *to break open and enter such house*, and to take and seize such goods and chattels for the arrears of rent." This clause in the statute, requiring an oath, in order to enter a *dwelling house*, does not extend to other buildings, nor does the act, in terms, require any *warrant* from the Justice; but, as calculated to induce respect and submission, the most prudent course is to obtain a regular sealed warrant from the Justice, directed to the constable and all other Peace Officers; and the Justice should examine the parties as to the facts, and require so full and explicit an oath, as unquestionably to bring the facts within the meaning of the statute. (y) If the oath should be insufficient, and the Justice nevertheless should issue his warrant, he might perhaps be liable to an action of trespass; (z) and if a party should make the oath without adequate cause, he might be sued in case; (a) and in this proceeding, as much care

(t) *R. v. Rabbits*, 6 Dowl. & R. 341, *ante*, 165.

(u) *Ante*, 195 to 212; and see *R. v. Morgan*, Caldecot, 156. As to the distinctions between the stricter requisites of *convictions*, than of orders, [see Burn J. tit. Orders of Justices, and *R. v. Hissler*, Sayer Rep. 304.

(v) See 2 Chitty on Pleading, 5th ed. 495, b, c, d.

(w) Burn J. tit. Distress, 26th edit.

1 Vol. p. 1009 to 1013.

(x) What is a fraudulent removal or not, *ante*, 246.

(y) See form of oath and warrant, in Burn's Justice, title Distress, Forms, 26th edit. 1 Vol. 1012, 3.

(z) *Morgan v. Hughes*, 2 T. R. 225, and *ante*, 178, 179.

(a) *Semble, Elsee v. Smith*, 2 Chit. Rep. 304; and *ante*, 179, 180, 227.

in ascertaining that there has been a removal, in every sense of that term *fraudulent*, as also that the goods are concealed in the particular dwelling-house, is as essential as in obtaining a search warrant. (b)

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

The 59 G. 3. c. 12. s. 24, after reciting "that *difficulties* had frequently arisen, and considerable *expenses* had sometimes been incurred, by the refusal of persons who had been permitted to occupy, or who had intruded themselves into parish or town houses, or otherwise, belonging to such parishes, to deliver up the possession thereof when thereunto required," enacts, that if any person who has been permitted to occupy, or hath intruded himself into *such* house or property, shall neglect to quit or deliver up possession *within one month after notice and demand in writing*, signed by the churchwardens and overseers of the poor of the parish, or the major part of them, and delivered to the person in possession, or in his absence affixed to some notorious part of the premises, it shall be lawful for two justices, upon *complaint* of one or more of the then churchwardens or overseers, to issue their summons to the person complained against, to appear before such justices, at a time and place therein appointed, and to cause such summons to be personally served, or to be affixed on the premises, *seven* days at the least before the time appointed for hearing such complaint; and such justices are thereby empowered and required, upon the appearance of the party, or upon proof on oath of such service or affixing of the summons, to proceed to hear and determine the matter of such complaint, and if they shall find and adjudge the same to be true, then by warrant under their hands and seals to cause possession of the premises to be delivered to the churchwardens and overseers of the poor, or to some of them." The 25th section extends the like summary proceeding to recover *land* appropriated for the poor from the persons intruding thereon. And the schedule of the act directs the forms of proceedings.

Thirdly, Summary remedy by justices, where *paupers* occupying as such retain possession after permission withdrawn under 59 G. 3, c. 12. s. 24, 25.

The *difficulties* alluded to in the recital, were principally that of ascertaining in whom the legal estate or interest of the house or property was vested, so as to lay the demise properly in ejectment; for before the enactment in the 17th section of the statute, parish property did not vest in the churchwardens and overseers for the time being as a body corporate; (c) and

(b) What not a fraudulent removal, *ante*, 246; and as to Search Warrants, *ante*, 179, 180.

(c) *Woodcock v. Gibson*, 4 B. & Cres. 525; *Phillips v. Pearce*, 5 B. & Cres. 433.

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

the *expenses* were those of an action of ejectment, which would frequently much exceed the value of the fee simple of the property to be recovered. This statute, however, is accumulative, and does not take away the common law right of the parish officers to take possession without a month's notice, and without the assistance of justices, where a pauper or other person wrongfully refuses to quit, provided the possession can be obtained without a breach of the peace or forcible entry. (d)

The statute does not expressly require a complaint in writing or on oath; and therefore neither is strictly necessary; (e) but the forms in the schedule should be observed; and it is recommended to magistrates fully to investigate the facts, so as to ascertain whether they strictly fall within the meaning of the act, and not otherwise to interfere.

Fourthly,
Justice's as-
sistance, in
case of *exorbi-*
tant charges
upon a distress
for arrear of
rent, not ex-
ceeding 20*l.*
57 G. 3, c.
93. (f)

The 57 G. 3. c. 93, was enacted in favour of tenants, and to enable a justice of the peace to afford redress, by summary proceeding, against excessive charges of a distress for rent, when made for an arrear not exceeding 20*l.* The schedule of the act specifies the allowed charges incident to such a distress, viz: 3*s.* for the levy, and 2*s.* 6*d.* per day for the man in possession, and 6*d.* in the pound for appraising, and the stamp duty thereon; and for all the expenses of advertisements, if any, 10*s.*, and a charge at the rate of 5*l.* per cent. on the net produce of the sale, for catalogues, sale and commission, and delivery of goods; so that if the rent be paid on the day of distress, the expenses may not exceed 5*s.* 6*d.* (f) If there be an unlawful charge, a justice is to summon the party complained of; and if, upon the hearing, it be established that more has been levied, taken, received, or had than is lawful, he is to order and adjudge treble the amount of the money unlawfully taken, to be paid by the wrong-doer, with full costs, to be levied by distress; and in default of goods, the party is to be committed till satisfaction of the order or judgment. The 3d section gives the justice express power to summon witnesses, and subjects them to 40*s.* penalty if they do not attend or refuse to give evidence, to be levied as aforesaid; and the 4th section enables the justice, if the complaint be unfounded, to give costs to the party complained against; but no judgment is to be given against any

(d) *Wildboar v. Rainforth*, 8 Bar. & Cres. 4.

(e) And see 3 Bar. & Cres. 649; 5 Dowl. & R. 558.

(f) It would prevent the increase of trifling actions for small irregularities in distresses, if summary remedy were

given to the extent of five pounds damages in general. At present there is almost a daily waste of time in the Superior Courts, in trying actions of this nature, where scarcely two pounds damages are recovered, but the costs exceed perhaps one hundred.

landlord, unless he personally levied the distress. The act then provides, that this summary remedy, unless there has been a justice's order or judgment, shall not be any bar to any other proceeding; and the schedule gives the form of order, as well for as against the complainant.

CHAP. IV.
SUMMARY PRO-
CEEDINGS, &c.

The provisions of this act having been found of great practical utility, they have been extended to distresses for land tax, assessed taxes, poor rates, church rates, tithes, highway rates, sewer rates, or any other rates, taxes, impositions, or assessments whatsoever, where the sum demanded and due does not exceed 20*l.* (*g*)

Under the antecedent system of laws relating to the customs and excise, as well as the new enactments in 3 & 4 W. 4. c. 50 to c. 60, justices have summary jurisdiction to hear and determine offences, in a manner much resembling the general course of proceeding pointed out in this chapter, and the principle of which will in all cases apply, where there has not been an express enactment upon the subject, but which must always be ascertained. The usual course of proceedings under the Custom Laws (*h*) and Excise Laws, (*i*) are stated exclusively in the 26th edition of Burn's Justice, title Excise and Customs; and the observations there to be found would assist in general.

Summary pro-
ceedings before
justices, under
the laws re-
lating to Cus-
toms and Ex-
cise.

We have thus given an outline of the principal requisites to be observed by magistrates and others, in conducting summary proceedings, from the complaint of an injured individual or informer to final conviction, and the proceedings to enforce the same; a jurisdiction and practice of most essential and extensive importance. It will be a source of great gratification to the author, if it should be pronounced that this attempt has afforded any assistance to Justices of the Peace, or guarded them against those errors, the frequency of which might tend to bring their office into disrepute; for although he has been compelled to point out some discreditable instances of *gross blunders*, and some still more culpable *wilful* abuses of power, yet long experience has induced him to entertain a deep respect for the majority of magistrates, whose gentlemanly, temperate, and humane, but at the same time firm and judicious conduct, have, he is confident, mainly conduced to the continuance of the public peace and harmony of society.

Conclusion.

(*g*) 7 & 8 Geo. 4, c. 17; and see the statutes, Burn's J. 26th edit. 1 Vol. 630.

(*h*) See course of proceedings for a penalty, &c. under the former Customs Laws, 2 Burn J. 26th edit. 2 Vol. 210 to

224; but see now 3 and 4 W. c. 50 to c. 60.

(*i*) See course of proceeding for a penalty, &c. under Excise Laws, Burn J. 26th edit. 2 Vol. 689 to 730.

INDEX

TO THIRD PART.

ABATEMENT,

amendment of law as respects nonjoinder, 51, 2.
 plea of nonjoinder must aver omitted party resides in England, 52.
 affidavit of that fact also required, *ib.*
 may reply that omitted party is discharged by bankrupt or insolvent act, *ib.*
 in second action, may have verdict against such as are proved liable, *ib.*

ACQUITTAL. See *Justices of the Peace.*

form of acquittal upon an information, 194, note (g).

ADJOURNMENT.

when justice should adjourn, 178, 184.
 may adjourn, 185, 192.
 care to be observed before adjourning, 184.
 postponement of justice's decision, when, 192.

ADJUDICATION. See *Justices of the Peace.*

form of, in conviction prescribed by statute 3 Geo. 4, c. 23, 198, in notes.
 and requisites of, in general, 202 to 208.
 should appear that a judgment was pronounced, 203.
 must be precise and certain, *ib.*

ADVERTISEMENTS.

expediency of, to ascertain who to be a plaintiff or defendant, 47, 48.
 should avoid libellous expressions, 48.

AFFIDAVIT. See *Oath.*

form of, in swearing to service of notice of motion for certiorari, 223.
 in support of motion for certiorari, *ib.*
 what it should state, *ib.*

AFFIRMANCE OF CONVICTION. See *Justices of the Peace.*

conviction if affirmed, party to pay costs of appeal, 226.
 execution to enforce, *ib.*

AGENTS.

cannot consent to a reference without an express power to do so, 77.

AGREEMENT TO REFER.

action may be supported for breach of, 80.
 court of equity, will not in general compel specific performance of, *ib.*
 may be revoked before award made, 79.
 unless it has been made a rule of court, *ib.*
 should be in writing, 86.
 or not within the act, *ib.*
 affidavit of execution of, may be made at any time, 91.
 form of affidavit of, 92.

AMICABLE ADJUSTMENT. See *Compromise.*

duty of attorney in negotiation of, 23.
 when there should be no concealment in negotiation for, 24.
 duties of parties and attorney relating to, 57, 58.
 enforced in equity, 58; *Attwood v. ———*, 5 Russell Rep. 149; *Goodman v. Sayers*, 2 Jac. & Walk. 249.

ANGLING. See *Justices of the Peace.*

penalty for, 136.

APOLOGY.

of the propriety of asking for, 57.
 humiliating one should not be asked, *ib.*
 duty of attorney, to afford opportunities for, *ib.*

APPEAL. See *Justices of the Peace*.

- against conviction by *one* justice, when not if by two, 138, 9, 142.
- no appeal unless expressly given, 215.
- proceedings on appeal, 138, 9, 142.
- when may be made, 214, 5.
- justice's duty in respect of, 215.
- party appealing must enter into recognizances, 215.
- and give notice of appeal, 216.
- notice must explicitly state all the objections, 217.
- on whom must be served, 217.

APPEARANCE. See *Justices of the Peace*.

- in default of, when arbitrator may proceed *ex parte*, 82.
- justice may proceed *ex parte*, 134, 137.
- when it cures defect in information, 170.
- summons, 176.
- statement of in conviction, 199.

APPOINTMENTS.

- of meetings before arbitrator, 93, 4, 5.
- form of, 93.

ARBITRATION, References to. See *Award, Submission*.*General Points.*

- the least hostile mode of proceeding, 70, 71.
- is sometimes compulsory, 70.
- but generally optional, *ib.*

First, Preliminary Observations upon References to Arbitration, 73.

- when and under what circumstances they are expedient, *ib.*
- trial by jury the most satisfactory tribunal, *ib.*
- arbitrator should have had a *professional* education, 74.
- attempts to *force* arbitration hitherto unsuccessful, *ib.*
- principal instances of successful attempts to compel, *ib.*
 - in the Friendly Society Act, *ib.*
 - Saving Bank Act, *ib.*
 - Labourers and Servants in certain Trades, *ib.*
 - in disputes respecting seamen's wages, *ib.*
 - in certain claims for salvage, *ib.*
- reasons why arbitration is compelled in those cases, *ib.*

When a reference is proper, 75.

- in cases of long and intricate accounts, *ib.*
- or where necessary to refer to numerous documents, *ib.*
- or make or explain calculations, *ib.*
- where difficult to collect all witnesses together on a particular day, *ib.*
- between neighbours respecting nuisances, ancient lights, way or water-courses, *ib.*
- or upon title to land where claim small, *ib.*
- in investigating subjects of delicacy between relations, *ib.*
- unless injury to character has been sustained, *ib.*

When a reference is improper, 75.

- in cases of calumny, *ib.*
- or cases of criminal conversation, 75, 6.
- unless husband has no intention to seek a divorce, 76.
- in criminal matters, unless by consent of Court, 75.
- other cases, *ib.*
- not when a defence is *stricti juris*, unless under qualified terms, *ib.*
- caution necessary in terms of reference, *ib.*

Secondly, Who may refer, 77.

- an infant or married woman cannot, *ib.*
- a partner may, but not to bind co-partners, *ib.*
- agents must have express power to refer, *ib.*
- but at law counsel or attorney may bind client by referring at *Nisi Prius*, *ib.*
- and party cannot avoid the reference, *ib.*
- even upon oath of his express prohibition, *ib.*
- in equity, solicitor cannot, unless by express authority, *ib.*
- when executors, &c. should refer, *ib.*
- should not without the consent of creditors, &c., *ib.*
- when defendants should guard against personal liabilities, *ib.*
- assignees should obtain consent of major part of creditors, *ib.*
- and guard against making themselves personally liable, 78.

ARBITRATION, References to—(continued).

- Thirdly*, Utility of reference to find facts for the opinion of Court, 78.
 by having facts concisely stated by arbitrator, *ib.*
 recent acts enable parties to do this, *ib.*
 but not until after issue joined, *ib.*
 but it may be effected by consent without action, *ib.*
 formerly this could not be done without the expense of a trial, *ib.*
 when submission has been made a rule of Court, award may find facts specially subject to opinion of Court, *ib.*
 who will, after argument, determine on same, *ib.*
 form of such a reference, 90, 91.
 and of award thereon, 112, 113.
- Fourthly*, Distinctions between references at *common law*, and under the *statutes*, 79.
 at common law may be either verbal, *ib.*
 or in writing not under seal, *ib.*
 or by specialty, either bond or covenant, *ib.*
 or by rule or order of a judge of Court in which action depending, *ib.*
 and award made before revocation is equally binding, *ib.*
 parties may countermand before award, *ib.*
 unless submission has been made a rule of Court, *ib.*
 but action sustainable for breach of agreement to refer, 80.
 though in general a Court of Equity will not compel specific performance of such an agreement, *ib.*
 obligation and effect of an arbitration in pursuance of 9 & 10 W. 3, c. 15, and 3 & 4 W. 4, c. 42, s. 39, 40, 41, *ib.*
 statement of 9 & 10 W. 3, c. 15, *ib.*
 statement of 3 & 4 W. 4, c. 42, s. 39, 40, 41, 82.
- Fifthly*, Who may be an *arbitrator*, arbitrators or umpire, 83.
 should be free from interest or bias, *ib.*
 not a relative, *ib.*
 why preferable to refer to a barrister, 84.
 precautionary provisions for securing another arbitrator, *ib.*
 how to act if arbitrator refuse to proceed, *ib.*
 must proceed in action as if no reference had taken place, 85.
 Court of Chancery has refused to compel arbitrator to proceed, *ib.*
- Sixthly*, The *Practice and Law*, 86.
- 1st. The terms of submission, *ib.*
 care required in framing, *ib.*
 stipulation that submission shall be made a rule of Court, 86.
 agreement to refer should be in writing, *ib.*
 otherwise not within the act, *ib.*
 and if not, might be revoked, 87.
 submission by agent or trustee, how to be framed, *ib.*
 submission by executors, assignees, &c., *ib.*
 of limiting power of arbitrator, *ib.*
 to prevent him making a *general* award, *ib.*
 or to require him to state facts or point of law, *ib.*
 other suggested terms, 88.
 forms of submissions, *ib.* See *tit. Forms*.
 when reference by rule or order of Court, it may be amended, 89.
 otherwise not, *ib.*
 as to insertion of omitted matters, 89.
 but not to substitute arbitrator, 90.
 - 2dly. The affidavit of execution of submission, 91.
 may be made at any time after, *ib.*
 and the making of it enforced, *ib.*
 prudent to obtain same immediately instrument has been signed, 92.
 form of affidavit, *ib.*
 - 3dly. Of making submission a *rule of Court*, 92.
 may be made before or after award, *ib.*
 in vacation as well as term, *ib.*
 when by agreement or deed advisable to make it a rule of Court shortly after, *ib.*
 - 4thly. *Appointment of Umpire*, 93.
 when arbitrators have power, may appoint one before disagreement, *ib.*
 better to do so, *ib.*
 on refusal of one umpire to accept appointment, arbitrator may appoint another, *ib.*

ARBITRATION, References to—(*continued.*)

- umpire may make award after arbitrators have refused to proceed, 93.
- but in general not before, *ib.*
- how umpire should be appointed, *ib.*
- form of arbitration, appointment of one, *ib.*
- 5thly. The Meetings and securing attendance of *Witnesses*, 94.
 - difficulty of securing punctual attendance, *ib.*
 - necessity or expediency of written appointments of meetings, *ib.*
 - and of appointing two consecutive days, *ib.*
 - duplicate of appointments should be signed by arbitrator, *ib.*
 - form of appointment of first or other meeting, *ib.*
 - a peremptory and final meeting, and of intention to proceed *ex parte*, *ib.*
 - hearing and production of evidence at the *first* meeting, *ib.*
 - should be principally of documentary evidence, *ib.*
 - as admissions may be made to save attendance of expensive witnesses, 95.
 - attornies should evince candour before arbitrator, *ib.*
 - meetings should be actually effective, *ib.*
 - sufficient witnesses should be in attendance, *ib.*
 - or attorney be prepared with documentary evidence, *ib.*
 - his duty in this respect to avoid expense, *ib.*
 - attendance of witnesses enforced by 3 & 4 W. 4, c. 42, s. 40, *ib.*
 - regulation to be attended to to enforce attendance, *ib.*
 - must be a tender of expenses, *ib.*
 - judge's order can only direct attendance for two named consecutive days, *ib.*
 - notice of appointed meetings, *ib.*
 - written appointment should be obtained from arbitrator, 96.
 - and duly served on opponent's attorney, *ib.*
 - and formal notice served where meeting intended to be final, 96.
 - prudent to leave copy at chambers of respective counsel, *ib.*
 - otherwise award might be set aside, *ib.*
- 6thly. Of *Enlargement* of the time, 96.
 - in general arbitrator has power to enlarge, *ib.*
 - enlargement should be duly made according to terms of order, *ib.*
 - or award would be void, *ib.*
 - power to enlarge in general discretionary, *ib.*
 - when award would be set aside for not allowing sufficient time, 96, 118.
 - when Court will order enlargement, 97.
 - for what time enlargement should be made, *ib.*
 - form of enlargement, *ib.*
- 7thly. The proceedings and hearing before arbitrator, *ib.*
 - arbitrator may proceed according to law and equity, *ib.*
 - and make award according to equity and conscience, *ib.*
 - without regard to strict rules of law, *ib.*
 - though not expedient to do so, *ib.*
 - proceedings should be conducted as in a Court of Law, 98.
 - how to be conducted, *ib.*
 - arbitrator may require a reciprocal statement, *ib.*
 - and declaration of what facts, &c. admitted, &c. *ib.*
- 8thly. Of enforcing attendance of *Witnesses*, *production of Documents*, and *swearing Witnesses* before arbitrator, 98.
 - formerly no mode of compelling attendance of a witness, *ib.*
 - even when he had engaged to attend, *ib.*
 - doubted whether he could be indicted for false swearing, *ib.*
 - but now attendance enforced by 3 & 4 W. 4, c. 42, s. 40, *ib.*
 - production of document enforced, *ib.*
 - by application to a Judge or the Court, *ib.*
 - must be a tender of reasonable expenses, *ib.*
 - may be indicted for perjury, *ib.*
 - form of affidavit to obtain order or rule, 99.
 - judge's order, *ib.*
 - suggestions as to witnesses, 100.
 - submission should be made a rule of Court, *ib.*
 - though not necessary, *ib.*
 - appointment of meeting need not precede order for attendance of witnesses, *ib.*
 - most convenient at meeting to state to arbitrator known unwilling witnesses, *ib.*

ARBITRATION, References to—(continued.)

and get appointment for two consecutive days, 100.

9thly. Of the arbitrator's *swearing the witnesses*, 100.

usual to swear them at *Nisi Prius*, *ib.*

when omitted may be sworn before a judge, *ib.*

and jurats produced before arbitrator, *ib.*

when arbitrator may swear them, *ib.*

and in case of false swearing may be indicted for perjury, *ib.*

mode of swearing, 100, 101.

form of oath, 101.

10thly. Examination of parties, witnesses and evidence, 101.

in general order provides that arbitrator shall be at liberty to examine the parties themselves, 101.

sometimes advisable to insist on such a provision, *ib.*

arbitrators generally reluctant to exercise the power, *ib.*

discretionary to do so, *ib.*

where the parties had been examined by consent, Court refused to disturb award, *ib.*

though defendant a felon convict, 102.

11thly. Mode of *taking down* the evidence, 102.

should be carefully taken down, in questions and answers, *ib.*

when concluded, read over to witness, *ib.*

and if further questions and answers arise, they should be added, *ib.*

witness may sign the same, *ib.*

attornies may take copy, *ib.*

original kept by arbitrator, *ib.*

12thly. Of *Revocations* in fact or law, 102.

provisions preventing revocations in 3 & 4 W. 4, c. 42, s. 39, *ib.*

when agreement of reference within statute, revocation void, *ib.*

arbitrator may proceed *ex parte*, *ib.*

and award would be valid, *ib.*

when award void after notice of revocation, *ib.*

when party revoking may be proceeded against, *ib.*

revocation not absolutely prohibited, *ib.*

sanction of judge or court requisite, *ib.*

sometimes perhaps otherwise, where arbitrator acts partially or improperly, 103.

though proper course to apply for summons for leave to revoke, *ib.*

when *marriage* of woman pending reference a revocation, *ib.*

death at law an implied revocation, *ib.*

unless provided otherwise, *ib.*

as when award to be delivered to parties or executors, &c. *ib.*

provisions in case of death, *ib.*

decision of privy council, *ib.*

when surety liable for fulfilment of award made after death, 104.

when executor would be personally liable, *ib.*

death of *Arbitrator* determines power to proceed, *ib.*

unless provided otherwise, *ib.*

bankruptcy, its effects, *ib.*

not necessarily a revocation, *ib.*

when award not conclusive against assignees, *ib.*

when assignees would be bound by award, 105.

when may refer, *ib.*

certificate of bankrupt when not a discharge, *ib.*

advisable that submission should provide for revocation in case of bankruptcy, *ib.*

13thly, of the *award*, 105.

must conform to the authority in submission, *ib.*

will be void for even slight informality, *ib.*

instances, *ib.*

when power of arbitrator limited, he cannot go beyond it, 106.

must in terms or substance decide on all claims referred, *ib.*

and notice same in award, *ib.*

when award void for omission, 107.

award to do an impossible or illegal act, when valid, *ib.*

must be final, and when deemed so, 107, 8.

when not final or defective, because it does not order payment, 108.

attachment refused for omission, *ib.*

legal arbitrator may decide contrary to strict rules of evidence or law, *ib.*

ARBITRATION, References to—(*continued.*)

- court will in general refuse to set aside award so found, 109.
 - unless real injustice appear, *ib.*
- arbitrator should in general receive and act upon legal evidence, *ib.*
- and decide according to law and equity, *ib.*
- when reference made to avoid a legal and technical objection, arbitrator should not notice it, *ib.*
- Costs*, as to awarding them, 109.
- party succeeding should be indemnified from, *ib.*
- except when in some respect he has been to blame, *ib.*
- then division of expenses would be just, *ib.*
- agreement of reference generally contains provisions as to costs, *ib.*
- when costs of reference are costs in the cause, 109, 110.
- when not, 110, 111.
- form of awards, 111. See *Forms*.
- when an award may be good in part and void as to the residue, 114.
- Publication* of award, when, 115.
- is so when notice given, that it is ready for delivery on payment of fees, *ib.*
- Amendment* of award not in general allowed, *ib.*
- unless parties consent, *ib.*
- court cannot interfere to alter the terms of an award, *ib.*
- 14thly. *Certificates* in lieu of an award, 112.
 - usual in causes of small importance, *ib.*
 - or mere quantum of damages referred, *ib.*
 - avoids the expence of stamps, 114.
 - form of certificate, *ib.*
- 15thly. *Offsetting* aside awards, 116.
 - enactments in statutes, 81, 82, 116.
 - upon what grounds an award can or not be set aside on motion, *ib.*
 - principles are the same at law as in equity, *ib.*
 - disobedience of, when made a rule of court, treated as contempt of court, *ib.*
 - unless arbitrator misbehaved himself, 117.
 - or award procured by corruption, &c. *ib.*
 - will not be set aside on a question of fact, *ib.*
 - excepting for corruption, partiality, or irregularity of conduct in arbitrator, *ib.*
 - or on point of law when arbitrator a barrister, *ib.*
 - or on account of improper rejection or admission of the evidence of a witness, *ib.*
 - arbitrator may relieve against a harsh right, *ib.*
 - though the same would prevail in court of justice, *ib.*
 - where legal rights referred, award must be according to law, *ib.*
 - qualification of this rule, 117, 118.
 - if arbitrator exceed his jurisdiction, award may be set aside, 118.
 - when court will set aside award for misconduct of arbitrator, *ib.*
 - when not, 119.
 - when court will open award, 120.
 - or interfere to set it aside when void on face of it, *ib.*
 - will not after party objecting has adopted an award, *ib.*
 - within what time motion to set aside award must be made, 121.
- Practical proceedings* to set aside awards, 121.
 - submission must first be made a rule of court, *ib.*
 - when rule nisi must state objections, 122.
 - stated in affidavit, when sufficient, *ib.*
 - if made on slight grounds, will in general be discharged with costs, *ib.*
- 16thly. *Proceedings* to enforce performance of award, 122.
 - by attachment, 122, 3.
 - how opposed, 123.
 - by action, *ib.*
- 17thly. *Jurisdiction* in equity, 124.
- 18thly. *Arbitration* under particular statutes, 125.
 - compulsory under some statutes, as, *ib.*
 - The Friendly Society act, *ib.*
 - Saving Banks' act, *ib.*
 - for Seamen's Wages, *ib.*
 - under the Salvage acts, *ib.*

ARBITRATOR. See *Arbitration, Reference to.*

- should have had a professional education, 74.
- power of may be revoked before award, 79, 87.
- unless submission has been made a rule of Court, 79.
- who may be one, 83.
- should be free from interest or bias, *ib.*
- and not a relative of parties referring, *ib.*
- in general preferable to be a barrister, 84.
- Court of Equity will not compel him to proceed with reference, 85.
- when he may appoint umpire, 93.
- should do so before disagreement, *ib.*
- if umpire refuse to act, may appoint another, *ib.*
- form of appointment of one, *ib.*
- power of compelling attendance of witnesses before, 94, 5.
- appointment of meetings, 94.
- in general has power to enlarge time for making his award, 96.
- may proceed according to law and equity, 97.
- may make award according to equity and conscience, *ib.*
- without regarding *strict* rules of law, *ib.*
- but most expedient to do so, *ib.*
- should conduct reference as in a Court of Law, 98.
- may require a reciprocal statement, *ib.*
- and declaration of what facts will be admitted or disputed, *ib.*
- party false swearing before, may be indicted for perjury, *ib.*
- may swear the witnesses, 100.
- mode of swearing, 100, 1.
- form of oath, 101.
- may sometimes examine the parties themselves, *ib.*
- how he should take the evidence, 102.
- when he may proceed *ex parte*, *ib.*
- must conform to the authority in submission, 105, 6.
- or award will be void, 105, 118.
- how award should be drawn up, 105, 6. See *Award.*
- when may give certificate in lieu of award, 112.
- misconduct of, ground of setting award aside, 117, 118.

ARTICLES OF CLERKSHIP. See *Clerkship Articles of, Attorney and Solicitor.***ARTICLED CLERKS.** See *Attorney and Solicitor.*

- regulations to be observed respecting, 1 to 16.
- twenty-two points to be observed, 4, 5.
- of the articles, 5. See *Attorney and Solicitor.*
- terms of the articles and suggestions for improvement, 9, 10.
- points to be observed before and after execution of the articles, 10.
- what service essential, 10, 11, 12.
- examination of before admission, 12, 13.
- their education, 13 to 16, 41.

ASSAULT AND BATTERY. See *Justices of the Peace.*

- summary proceedings before justices for, 132.
- provisions of 9 Geo. 4, c. 31, s. 27, 132.
- only applies to common assaults and batteries, 132, 3.
- does not, if accompanied by attempt to commit felony, 132, 3.
- or where any question arises as to title to land, 133.
- or resisting process of any Court of Justice, 134.
- form of information for, 171, note (*u*).
- on oath of credible witness, offender may be summoned, 134.
- form of such oath, 173, note (*b*).
- in default of appearance, justice may proceed *ex parte*, 134, 137.
- or may be apprehended in first instance, 134, 137.
- prescribed form of conviction, 134, note (*t*).
- construction of act, 9 Geo. 4, c. 31, 143, 4.

ASSETS.

- bill in equity lies to discover, 52.

ASSIGNEES.

- of bankrupt, when they should consent to a reference, 77.
- should guard against personal liability, 78.

ASSIGNEE OF BOND.

- must sue in name of obligor, 47.

ATTENDANCE.

of witnesses before an arbitrator enforced, 95.
 regulations to be observed to enforce attendance, *ib.*

ATTORNEY AND SOLICITOR. See *Articles of Clerkship*, and *Client*.

reasons why an admitted agent must be retained, 1 to 4.

of the articles of clerkship, 4 to 15.

regulations to be observed, 4.

twenty-two points to be observed, 4.

1. The master must be a regular practising attorney, 4.
2. Terms of articles of clerkship, 4.
3. Stamp thereon, 4, 10.
4. Affidavit of execution of articles, *ib.*
 to be filed within three months after date, *ib.*
5. Entry of such affidavit, *ib.*
6. Enrolment of articles, with affidavit of execution within six months, *ib.*
7. Affidavit of enrolment, and payment of duty, 5.
8. Service under the articles, *ib.*
9. Necessity for fresh articles to make up for lost time, *ib.*
10. Affidavit of regular service, *ib.*
11. Master's certificate of regular service, *ib.*
12. Notice of intention to apply for admission, *ib.*
 must be affixed outside the court, *ib.*
13. Entry of such notice at judge's chambers, *ib.*
14. Examination before judge, 5, 12, 13.
15. Petition, &c., to obtain admission in case of difficulty, 5, 13.
16. Oath to be taken, 5.
17. Stamp on admission, *ib.*
18. The admission itself, *ib.*
19. Enrolment of name on rolls of court, *ib.*
20. Entry of name, and place of abode, *ib.*
21. Annual certificate, and stamp duty thereon, *ib.*
22. Entry of certificate with proper officer, *ib.*

First, Of the articles, 5.

must be bound to a legally admitted attorney, &c., *ib.*

by contract in writing, to serve as a clerk for five years, *ib.*

which must be prospective, *ib.*

articles must not be antedated, *ib.*

nor executed after the five years have commenced, *ib.*

prudent to bind for more than five years, 5, 7.

with proviso, that at the expiration of five years clerk shall be at liberty to depart and obtain his admission, 5.

and that master shall facilitate that object, *ib.*

suggested form of proviso and covenant, 6.

otherwise, in case of wrongful absence during limited term of five years,

requisite affidavit of service could not be made, *ib.*

and fresh articles for further time would be requisite, *ib.*

suggested form of such articles, *ib.*

such fresh contract must be stamped with same duty as original articles, 7.

but Commissioners of Stamps will allow duty on first articles if delivered up within six months of execution of new articles, *ib.*

must be a service altogether of five years, *ib.*

but need not absolutely be continuous, *ib.*

and must be *bona fide* to a continuing practising attorney, &c., *ib.*

and not to one who has left off practice, *ib.*

or not practising as principal on his own account, *ib.*

or serving as writer or clerk to another attorney, *ib.*

master's neglect to obtain certificate, will not invalidate service of articulated clerk, 7.

binding may be to a prothonotary or secondary of superior courts, *ib.*

or to Master of Crown Office, *ib.*

service to, and admission as a solicitor, entitles to be admitted and practise as attorney, and *vice versa*, 8.

exceptions as to time of binding and service, *ib.*

as where clerk has taken degree of Bachelor of Arts or Law in one of the universities, *ib.*

then service for three years will suffice, *ib.*

provided such degree has been taken within limited time, *ib.*

clerk may serve one year as pupil to a barrister or certificated special pleader, *ib.*

ATTORNEY AND SOLICITOR—(continued.)

- binding must be *bona fide* to learn the law, 8.
- and not merely to secure business, *ib.*
- Terms of the articles, and suggestions for improvement, 9.
- statutes silent, except as to the service for five years, *ib.*
- are generally improvidently framed, *ib.*
- should contain master's covenant for return of premium in certain events, *ib.*
- though court would compel return, 10.
- master may covenant to pay a salary to clerk, 9.
- and this during term of articles, *ib.*
- or covenant to take into partnership, *ib.*
- or pay widow or family of deceased attorney an annuity, *ib.* *Candler v. Candler*, 1 Jacob. Rep. 225.
- may stipulate that clerk shall not practise within a reasonable distance, *ib.*
- nor conduct business for any of his master's clients, *ib.*
- or prejudice his master, *ib.*
- and this under payment of fixed damages as a *debt*, and not as a *penalty*, 10.
- Points to be observed before and after execution of articles, *ib.*
- age and circumstances of clerk at time of binding, *ib.*
- his previous education, *ib.*
- articles must be stamped before engrossed, *ib.*
- and the affidavit of execution duly filed, *ib.*
- articles should be enrolled within six months, *ib.*
- neglect, how prejudicial, *ib.*
- Service and affidavit thereof, 10.
- the binding must be for five years, *ib.*
- enactments of 22 G. 2, c. 48, as to term of binding and service, *ib.*
- provisions in case of death of master, 11.
- or leaving off practice before end of term, *ib.*
- or cancelling contract by mutual consent, *ib.*
- or clerk being discharged by rule of court before end of term, *ib.*
- or determination of articles by any other event, *ib.*
- affidavit of actual service, requisite before admission, *ib.*
- must be a *bona fide* exclusive continuing service, *ib.*
- and to master named in articles, *ib.*
- clerk should, at all reasonable times, be under immediate control of master, *ib.*
- statute not complied with, by service to another attorney, *ib.*
- though with master's consent, *ib.*
- if admission obtained, not having so served, he may be struck off the roll, *ib.*
- service under Notary's Act not complied with, by attending as a banker's clerk part of the day, *ib.*
- clerk articulated to one attorney, partner in a firm, may serve all in their joint business, 12.
- or assist another attorney at *extra hours*, *ib.*
- what absence is allowed, *ib.* See also, 13, 41.
- occasional holidays no breach of legal service, 12.
- especially in case of ill health, *ib.*
- service to agent of master, limited to one year, *ib.*
- where a *bona fide* service, court will not be astute in construing the act, *ib.*
- Examination of clerk before admission, 12, 13.
- by 2 G. 2, c. 23. s. 2, judges examine fitness to act as attorney, 12.
- if judge satisfied, then to administer oath, 12.
- and cause him to be admitted and enrolled as an attorney, 13.
- in case of difficulty, the clerk may petition court, *ib.*
- whose decision will be final, *ib.*
- and *semble*, no court of appeal or higher tribunal, *ib.*
- right of attorney admitted to Superior Courts, to be admitted to practise in Inferior Court, *ib.*
- but this, subject to custom or practice of latter, *ib.*
- when admission may be enforced by *mandamus*, *ib.*
- suggested propriety of examination of clerks being transferred to other delegated authority, *ib.*
- with power of appeal to judges for or against admission, *ib.*
- Education of articulated clerks, 13.

ATTORNEY AND SOLICITOR—(continued.)

- preparatory education considered, 13, 41.
- should not be articled before sixteenth year, 13.
- and should have had a good classical education, *ib.*
- advantages of studying the useful sciences, 14, 41.
- should be well informed of the dead languages, 14.
- and all other branches of knowledge and literature, *ib.*
- especially of physics or natural philosophy, *ib.*
- and this before commencement of *legal* pupillage, *ib.*
- advantages of being articled for six years, 14, 15.
- should be articled to a master of liberal education, 14.
- what knowledge desirable, *ib.*
- study of biographical works recommended, 15.
- knowledge of temperament and character of mankind, *ib.*
- How far the want of legal qualifications, may or not affect the client, 15, 16.**
- incompetency subjects attorney, &c., to penalty of 50*l.*, 15.
- and precludes him from suing except merely for giving advice, *ib.*
- but does not affect client, 16.
- or deprive him of full costs, if plaintiff, and successful, *ib.*
- except, when warrant of attorney executed by a defendant, in custody under mesne process, *ib.*
- then presence of uncertificated attorney insufficient, *ib.*
- prudent to ascertain that party is attorney of proper court, *ib.*
- How to select an attorney, 16. 1 Vol. 435.**
- should employ an *experienced* solicitor of established character, 16.
- or one whose zeal, &c., would make up for want of experience, 17.
- the principal desideratum should be honorable character, *ib.*
- reasons why this should be attended to, *ib.*
- purchaser should not employ vendor's attorney, *ib.*
- nor *cestui que trust* employ a trustee who is an attorney, *ib.*
- nor should he act as such, *ib.*
- if he do, he cannot charge for professional business, *ib.*
- Not to be concerned against a person previously his client, 18.**
- if he do, Court of Equity would restrain him from divulging confidential communications, 18.
- cannot give up his client and act for opposite party, *ib.*
- nor solicitors in partnership to dissolve, so as to enable one partner to act against client of the other, *ib.*
- one solicitor and clerk in court may be concerned for opposed parties, *ib.*
- but this disapproved of, *ib.*
- same objection applies to London agent, acting for country attorneys on both sides, *ib.*
- but no injunction to restrain articled clerk from afterwards acting as attorney against a client of his late master, *ib.*
- consequent risk of deeds in attorney's office being accessible to clerks, 18, and *ante*, vol. 1. 436.
- expediency of stipulating in articles of clerkship against clerk acting injuriously to interests of master's clients, 18.
- and for clients stipulating for a guarantee against such consequences, *ib.*
- Retainers in writing recommended, and why, 18.**
- formerly requisite for attorney to file retainer to sue, 19.
- but now not requisite, either at law or in equity, *ib.*
- though such omission has been censured, *ib.*
- and would create a prejudice against the attorney, *ib.*
- observations of Lord Tenterden on the subject, *ib.*
- should be given for the client's sake, *ib.*
- and qualified according to deliberate intention of party, 19.
- specially when solicitor retained by assignees of bankrupt, 20.
- should obtain the signatures of all his employers, *ib.*
- should stipulate for due care in ascertaining title, *ib.*
- with engagement to make satisfaction upon the discovery of the defect, *ib.*
- this to avoid the Statutes of Limitation, *ib.*
- form of retainer on behalf of plaintiff to sue, *ib.*
- on behalf of defendant to defend, *ib.*
- Confidence, observance of, 20.**
- attorney or solicitor cannot legally disclose client's communications, 18 and 20.
- nor can he be *compelled* to disclose them, 20.
- though as to *acts* done in his presence, no such privilege, 21.

ATTORNEY AND SOLICITOR—(*continued.*)

held by Lord Tenterden to be confined to communications relating to a *suit*, 21.

but now held not so limited, *ib.*

otherwise, were one attorney employed for both parties, *ib.*

Duties of Attorney to ascertain facts, evidence, and law, before suit, 21, 53.

See fully title *Proceedings between Retainer.*

should be well assured of *sufficient evidence*, 21, 53.

when to examine witnesses in first instance, 21.

and that in absence of the client, *ib.*

Lord Tenterden's observations on duty of attorney in this respect, *ib.*

if law of case questionable, should suggest expediency of obtaining opinion, 22.

when thereby protected from liability, *ib.*

not protected, if case improperly stated, *ib.*

or stated too *generally*, *ib.*

or without drawing counsel's attention to particular facts, *ib.*

or has not raised material points, *ib.*

or has drawn a conclusion from deeds without laying the same before counsel, *ib.*

in these cases, he would be liable for negligence, *ib.*

if opinion doubtful or ambiguous, should require further opinion, *ib.*

if doubtful, should obtain written directions from client, how to proceed, 23.

observation of Lord Tenterden in such cases, *ib.*

of Lord Stowell, where the client is ignorant or illiterate, *ib.*

when attorney should attend to proceedings himself, *ib.*

and not delegate to a clerk, *ib.*

in case of neglect will have to pay costs himself, *ib.*

duty of attorney to ascertain proper parties, and cause of action, 46 to 53.

Negotiations, duty of attorney in respect of, 24; and see 58, and tit. *Compromise.*

should be conducted with candour and liberality, 24.

but when honor of opponent unknown, communication to be cautious, *ib.*

and this, though expressed, to be without prejudice, *ib.*

when negotiation for amicable adjustment, reciprocal duty not to conceal, 24.

or proctor, attorney, &c. may have to pay all costs, *ib.*

Taking securities for client, his duty therein, 24, 25.

when arrangement beneficial to client, should instantly obtain written agreement, 25.

lest party should fly from engagement, *ib.*

Expenses, impropriety of increasing same, *ib.*

Expedition, duty of, 25.

paramount importance of expedition, 25.

courtesy to opponent should not be shewn at expense of client, *ib.*

delays increase expense, 26.

instances of delays, *ib.*

when proceeds recovered, should be immediately paid to client, *ib.*

Remuneration to Attorney or Solicitor.

stipulations for remuneration out of usual course illegal, 26.

may stipulate for advances, *ib.*

or require guarantee of third person, *ib.*

in writing. expressing the consideration, 27.

cannot take a *prospective* mortgage to secure *future* costs, 27.

client should unasked offer advance of money, or security, 27.

attorney may refuse to proceed without advance, 27.

but must give due notice of his requiring same, 27.

at end of action, fees and bills to be promptly paid, 27.

unless there has been gross negligence, &c., *ib.*

or charges be for unnecessary and useless business, *ib.*

or excessive, *ib.*

if the latter, and any taxable item, then bill must be delivered one month before commencing action, *ib.*

if not taxable, then tender should be made, *ib.*

should not stipulate for remuneration to depend on the event, *ib.*

or stipulate to receive part of estate in lieu of costs, *ib.*

or to receive a named sum in case he should recover, *ib.*

ATTORNEY AND SOLICITOR—(continued.)

- any stipulation out of usual course illegal and void, 28.
- and Court of Equity will in general set it aside, *ib.*
- even a compromise on terms of not taxing, illegal, *Balme v. Paver*, 1 Jacob R. 307.
- Bill of Costs*, construction of 2 G. 2, c. 23, s. 23, as to necessity of month's delivery of, 28.
- act should be construed liberally in favour of suitors, *ib.*
- extends to Courts not of Record, *ib.*
- preparing replevin bond a taxable item, *ib.*
- although no bill had been delivered, *ib.*
- or procuring an insolvent's discharge, *ib.*
- or for business done under a commission of lunacy, 29.
- but it seems there must be some formal step *perfected*, or at least *prepared*, constituting the commencement of some *legal proceeding*, 29.
- as drawing and engrossing an affidavit to hold to bail, *ib.*
- or preparing a warrant of attorney, *ib.*
- or a charge for a *dedimus potestatem*, *ib.*
- or attending at a lock-up house and filling up a bail bond, *ib.*
- or attending and advising a party in a suit, *ib.*
- an item for business done under an extent, *ib.*
- What charges are not within the act*, 29.
- all business unconnected with any suit, 29.
- as for searching to see whether satisfaction of judgment had been entered, 29.
- or whether an issue had been entered and docketed, *ib.*
- or attending attorney of opposing creditor to resist insolvent's discharge, 29, 30.
- or where attorney had paid money in consequence of his undertaking to pay debt and costs, 30.
- or a bill for proceedings in bankruptcy, *ib.*
- though a charge for obtaining a certificate would be otherwise, *ib.*
- Taxing Bill of Costs.*
- when illiberal to tax, 30.
- when proceedings have been conducted faithfully, *ib.*
- unless charges are exorbitant, *ib.*
- when client resolves to tax, should do so within the month, *ib.*
- or pay the amount and then tax, *ib.*
- if charge improper, Court will, on motion, oblige attorney to refund, *ib.*
- but no action for amount can be sustained, *ib.*
- When delivery of Bill unnecessary*, and how to proceed if unreasonable, 30.
- statute 2 G. 2, c. 23, s. 23, only applies to proceedings relating to some suits or proceedings in Courts, *ib.*
- does not apply to charges for conveyancing, *ib.*
- but where charges exorbitant, money may be paid under protest, 31.
- or *tender* made, 31.
- without prejudice to an action, to try propriety of charges, 31.
- when an action may be sustained, 31.
- provisions of Usury and Annuity Acts with regard to solicitors procuring loans of money, 32.
- penalties under the same, 32.
- provisions evaded by attorney making extravagant charges for deeds and withholding a portion of the money, 32.
- in some cases held to invalidate annuity, 32.
- but in a late case held otherwise, 32.
- party may be compelled to refund, 32.
- and perhaps have to pay costs of application, 32.
- Liabilities of Attornies, &c.*, 32.
- generally not liable for a mistake on a point of law, when doubtful, 32.
- not absolutely protected by acting under counsel's opinion, 32, 22.
- especially when case not properly stated, 21, 2, 33.
- otherwise perhaps when case properly drawn, 33.
- liable for errors in *practical* department, *ib.*
- in these cases remedy by action, *ib.*
- and Court will not summarily interfere, *ib.*
- unless attorney guilty of want of *integrity*, *ib.*
- and then although no suit or proceeding pending, *ib.*

- AWARD.** See *Arbitration, Reference to.*
 enlargement of time for making, 96.
 in general power given to arbitrator, *ib.*
 must be duly made according to terms of order of reference, *ib.*
 or it will be void, *ib.*
 when would be set aside for not allowing sufficient time, *ib.*
 may be made according to equity and conscience, 97.
 without regard to strict rules of law, 97, 108.
 though most expedient to do so, 97.
 proceeding before the arbitrator, 97 to 102.
 of revocation of agreement in fact or law, when it avoids award, 102.
 when void after revocation, *ib.*
 when void if made after death, 103.
 when delivery of to be to executors, &c., *ib.*
 surety when liable for fulfilment of, 104.
 executors, and when liable under, *ib.*
 bankruptcy, its effects, *ib.*
 when not conclusive against assignees, *ib.*
 award must conform to authority in submission, 105.
 or will be void for even slight informality, *ib.*
 arbitrator cannot award further when power limited, 106.
 and must in terms or substance decide on all claims referred, *ib.*
 and award must notice same, *ib.*
 or will be void for omission, 106, 7.
 award to do an illegal act, when void, 107.
 must be final, and when deemed so, 107, 8.
 when defective for not ordering payment, 108.
 attachment refused for omission, *ib.*
 when not made according to strict rules of law, Court will in general refuse to set it aside, *ib.*
 unless real injustice appear on the face of it, 109.
 should be according to law and equity, *ib.*
 except reference made to avoid a legal and technical objection, arbitrator should not notice it, *ib.*
 as to awarding costs, *ib.*
 when just to divide expenses of, *ib.*
 when costs of reference, costs in the cause, 109, 110.
 when not, 110, 111.
 forms of awards, 111. See *Forms.*
 when certificate in lieu of, 112.
 award, when good as to part and void as to residue, 114.
 when published, 115.
 is so when notice given that same is ready for delivery, *ib.*
 cannot in general be amended, *ib.*
 unless parties consent, *ib.*
 Court cannot interfere to alter terms of, *ib.*
 when may be set aside, 116.
 provisions of statutes respecting, 81, 2, 116.
 on what grounds may be set aside, 116.
 disobedience of, when made a rule of Court, treated as contempt of Court, 116.
 where arbitrator misbehaved himself, 117.
 or procured by corruption, *ib.*
 will not on a question of fact, *ib.*
 or on point of law, when arbitrator a barrister, *ib.*
 or on account of improper rejection or admission of evidence, *ib.*
 may relieve against a harsh right, *ib.*
 though the same would prevail in a Court of Law. *ib.*
 if legal rights referred, must be according to law, *ib.*
 qualification of this rule, *ib.*
 may be set aside, if arbitrator exceeds his jurisdiction, 118.
 when for misconduct of arbitrator, *ib.*
 when not, 119.
 when may be opened, 120.
 or set aside when void on face of it, *ib.*
 will not when party objecting has adopted it, *ib.*
 within what time motion to be made, 121.
 practical proceedings in setting aside award, *ib.*
 the submission must be made a rule of Court, *ib.*
 when rule nisi must state objections, 122.

AWARD—(*continued.*)

- when sufficient, if stated in affidavit, 122.
- if application made on slight grounds, will be discharged with costs, *ib.*
- proceeding to enforce performance of, 122.
 1. By attachment, 123.
 - how opposed, *ib.*
 2. By action, 123.

AWARDS, Forms of. See title *Forms*.

BACHELOR OF ARTS.

- when proposed clerk has taken degree of, service for *three* years to attorney, &c. will suffice, 8.
- same exception in favour of students for the bar, 38.

BACHELOR OF LAW.

- when proposed clerk has taken degree of, service for *three* years to attorney will suffice, 8.
- same exception in favour of students for the bar, 38.

BARRISTERS. See *Students for the Bar*.

- no precise course of study or examination prescribed to become one, 37.
- before practising must have been a member of one of the Inns of Court for five years, 3, 4, 37.
- exception in favour of bachelor of laws, 38.
- rules respecting the admission of, 38, 39, 40.
- must obtain a certificate of approbation before he can be called to the bar, 3 & 4, 39.
- legal qualification not attended to by the benchers, 3 & 4, 39.
- may appeal to the judges when admission refused, 3 & 4, 39.
- such appeal rarely successful, 3 & 4, 40.
- cause of failure at the bar considered, 41.
- course of study recommended, 41.
- other attainments beyond the law requisite, 41, 2.
- the functions of, 42, 3.
- their opinions and the requisites of, 43.
 - should be direct and positive, *ib.*
 - reasons in support of succinctly stated, *ib.*
 - statutes and decisions shortly referred to, *ib.*
 - should suggest where case ambiguous, *ib.*
 - and what precautionary measures should be taken, 44.
- their duty with respect to pleadings, 44, 5.
- general character of, 45.
- retainer of, 71, 2.

BATTERY. See *Assault and Battery, Justices of the Peace*.

BEAST.

- penalty for stealing of, 135.

BILL OF DISCOVERY. See fully, tit. *Proceedings between Retainer, &c.*

- when necessary, to discover who to be defendant, 49, 52.
- when parties bound to answer, 49.
- when landlord may file, against tenant, *ib.*
- lies against lessee and mortgagor, when, 50.
- cannot be enforced, when on face of it *no remedy*, *ib.*
- to compel defendant to admit or deny a promise of marriage, 52.
- or signature to a memorandum taking case out of Statute of Limitations, *ib.*
- or to discover assets, *ib.*
- to exhibit an account of assets, &c. in Ecclesiastical Court, *ib.*
- when, to discover whether a particular person is in existence, 53.
- or where he resides, *ib.*
- provisions of 6 Ann, c. 18, to discover death of party, *ib.*
- of costs on bills of discovery, 54.

BILL OF COSTS. See *Attorney and Solicitor*.

- construction of 2 G. 2. c. 23, s. 23, as to necessity for a month after delivery of, 28.
- what are or not taxable items in, 28, 29, 30.
- to be taxable, must be for business connected with a suit, &c. 28.
- when illiberal to tax, 30.
- when action for amount may be sustained, 29, 30.
- when not, 30, 31.

BILL OF COSTS—*(continued.)*

- when delivery of bill unnecessary, 30.
- when a tender of amount of, should be made, 31.
- or amount paid under protest, *ib.*
- when Court will oblige attorney, &c. to refund, 30.

BILL TO PERPETUATE TESTIMONY. See *Evidence, Witnesses.*

CALUMNY.

- actions for, improper to refer, 75.

CAUSE OF ACTION.

- what, and how to discover it, 46, 52, 53.
- duty of attorney to ascertain, 52.

CERTIFICATE.

- of master, of regular service of articted clerk, 5.
- though usual, may be dispensed with, *ib.*
- of obtaining certificate, *ib.*
- stamp duty thereon, *ib.*
- entry of, with proper officer, *ib.*
- annual certificate, and duty thereon, *ib.*
- in lieu of an award, nature of, 112.
- form of, 114, in notes.
- form of justice's dismissal of information for an assault and battery, 195.

CERTIFICATED CONVEYANCER. See *Conveyancer Certificated.*

CERTIORARI. See *Justices of the Peace.*

- convictions under 7 & 8 G. 4. c. 29, 30, not to be removed by, 139, 142.
- in general lies as a matter of right, 219.
- unless taken away by statute, 219, 139, 142.
- when conviction may be removed by, 219, 220.
- when not, 139, 142.
- conviction under 9 G. 4. c. 31, not removable, 134.
- 7 & 8 G. 4. c. 29, 139.
- 7 & 8 G. 4. c. 30, 139, 142.
- 1 & 2 W. 4. c. 32, 139, 143.
- course to pursue when certiorari taken away, 220.
- within what time to be moved for, 221.
- what notice required, 221, 222.
- what it should contain, 222.
- who must sign it, *ib.*
- affidavit of service of notice must be made, *ib.*
- how to be entitled, *ib.*
- should specify grounds of objections, 223.
- form of affidavit of service of notice of motion, *ib.*
- in support of motion, 224.
- grounds on which Court will grant or refuse application for certiorari, *ib.*

CESTUI QUE TRUST.

- should not employ a trustee who is an attorney, 17.
- nor should he act as such, *ib.*

CHOSE IN ACTION.

- assignee of, must sue in name of obligor, 47.

CLASSICAL EDUCATION. See *Education of Articted Clerks.*

- of articted clerks, considered, 13, 14.
- of students for the bar, considered, 38 to 45.

CLERKSHIP, ARTICLES OF. See *Attorney and Solicitor.*

- twenty-two points to be observed, 5, 6.
- must be with legally admitted attorney, &c. 5, 7.
- and not to one who has left off practice, 7.
- or not practising on his own account or serving another attorney, *ib.*
- but may be to a prothonotary or secondary of Superior Courts, *ib.*
- or to the Master of the Crown Office, *ib.*
- in writing, to serve for five years, 5, 7.
- but need not absolutely be *continuous*, 7.
- and which must be prospective, 5.
- must not be antedated, *ib.*
- nor executed after five years have commenced, *ib.*
- prudent to bind for more than *five years*, 5, 7.

CLERKSHIP, ARTICLES OF—(*continued.*)

with proviso that at *expiration* of five years contract shall cease, and clerk be at liberty to depart and obtain his admission, 5.
 and that master shall facilitate that object, *ib.*
 suggested form of such proviso, 6.
 exceptions as to time of binding, and service, 8.
 as when proposed clerk has taken degree of bachelor of arts or law in the universities, *ib.*
 then service for three years will suffice, *ib.*
 terms of the articles, and suggestions for improvement, 9.
 suggested covenants, *ib.*
 points to be observed before and after execution of articles, 10.
 as to age and circumstances, *ib.*
 and education, *ib.*
 stamping articles before execution, *ib.*
 affidavit of execution should be duly filed, *ib.*
 articles should be enrolled within six months, *ib.*
 neglect to do these may prejudice, *ib.*
 what service and affidavit of service essential, *ib.*
 must be for five years, 5, 7, 10.
 enactments of 22 G. 2. c. 48. in this respect, 10.
 provisions in case of death of master, 11.
 or leaving off practice before end of term, *ib.*
 of cancelling contract by mutual consent, *ib.*
 or by rule of court before end of term, *ib.*
 provisions of 34 G. 3. c. 14. s. 8, as to determination of articles, *ib.*
 must be *bona fide* continuing service, *ib.*
 and under immediate controul of master, *ib.*
 statute not complied with by service to another master, *ib.*
 though with master's consent, *ib.*
 but articles to one partner in a firm, service to all the partners in their joint business, sufficient, 12.
 or may serve another attorney at *extra* hours, *ib.*
 may receive instructions in sciences, *ib.*
 or have occasional holidays, *ib.*
 especially in case of ill health, *ib.*
 may serve agent of master for *one year only*, *ib.*
 where a *bona fide* service, court will not be astute in construing the act, *ib.*

Fresh articles.

when necessary to make up for lost time, 6.
 suggested form of such articles, *ib.*
 must be stamped with same duty as original articles, *ib.*
 but commissioners will remit duty on original articles, *ib.*
 necessity for, avoided by binding for *six* years, 5, 7.

CLIENT. See *Attorney and Solicitor.*

conduct and interest of, considered, 16 to 34. See *Attorney and Client.*
 when affected by want of *legal* qualification of presumed attorney, 15.
 when not, 16.
 rules for client's selection of an attorney, *ib.*
 should employ experienced solicitor, *ib.*
 but principal desideratum *honorable character*, 17.
 purchaser should not employ vendor's attorney, *ib.*
 solicitor, &c. should not be concerned against party who had once been his client, 18.
 if he does, Court of Equity would restrain him from communicating confidential communications, 18, 20.
 cannot be given up by attorney to act for opposite party, 18.
 danger of leaving deeds of clients accessible to clerks, *ib.*
 expediency of stipulating with attorney against such danger, *ib.*
 and obtaining a guarantee, *ib.*
 should give a written retainer for his own sake, 19.
 and qualified according to intention of party, *ib.*
 should stipulate for due care in ascertaining title, *ib.*
 with engagement to make satisfaction on *discovery* of defect, *ib.*
 attorney's duty in obtaining proper securities for, 24, 25.
 should spontaneously offer advance of money to attorney, &c., 27
 attorney may refuse to proceed without an advance of money, *ib.*
 should promptly pay at end of suit, *ib.*
 unless there has been negligence, *ib.*

CLIENT—(continued.)

- or bill of costs excessive, 27.
- then he should tax the same, *ib.*
- when not taxable, should tender a sufficient sum, *ib.*
- when illiberal to tax attorney's bill, 30.
- should be taxed within the month, *ib.*
- attorneys, and liabilities, 32.
- bound by solicitor and attorney's consenting at nisi prius to a reference, 77.
- though against his express prohibition, *ib.*
- proceedings to be adopted by client before suit*, 46 to 71. See fully, tit. *Proceedings between, &c.*

COMMITMENT. See Justices of the Peace.

- should strictly pursue the conviction upon which founded, 213.
- deviation from, in general justice liable to action of trespass, 214.
- but this now aided when proceeding under 9 Geo. 4, c. 31, 7 & 8 Geo. 4, c. 29, c. 30, and 1 & 2 W. 4, c. 32, 214.
- must be in writing, 214.
- and not verbal, *ib.*
- nor for an unreasonable time, *ib.*
- demand of penalty, when should be made before commitment, 214.

COMMON ASSAULT. See Assault and Battery.**COMPENSATION. See Justices of the Peace.**

- summary proceedings to obtain, 127 to 251.

COMPLAINANT.

- in general not liable if acting *bona fide*, 227.
- but is if acting from malice, *ib.*
- not liable for errors of justice, 228.

COMPLAINT. See Information.**COMPROMISES.**

- duties of attorney relating to, 24, 57, 58.
- propriety of asking for considered, 57.
- duty of attorney to afford opportunities for, *ib.*
- how to conduct negotiation for, 24.
- may be invited on both sides, 58.
- should be *bona fide* and fairly conducted, *ib.*
- costs sometimes affected by, *ib.*
- in criminal cases, 58, 193, 4.
- at law, where several claimants all must concur, 58.
- different rule prevails in equity, *ib.*
- when sufficient for majority to agree, 59.
- enforced in equity, 58; *Attwood v. ———*, 5 Russell Rep. 149; *Goodman v. Sayers*, 2 Jac. & Walk. 249.
- when justices may interfere to effect, 193, 4.
- enactments in this respect, *ib.*
- when parties liable for compromising, 193.
- Computation of Time.*
- how month calculated, 69, 147.

CONFESSIONS. See Justices of the Peace.

- when sufficient, 184.
- defect in information, when not aided by, *ib.*
- recital of in conviction, 199.
- how to be stated in conviction, 198. note (f.)

CONCEALMENT.

- when for amicable adjustment, there should be none, 24.
- or attorney, proctor, &c. would be liable for the costs, 25.

CONFIDENTIAL COMMUNICATIONS. See Attorney and Solicitor, Client.

- how far courts prevent their disclosure of, 18, 20, 21.
- when court of equity will restrain from being communicated, 18, 20.
- attorney &c. cannot be compelled to disclose them, 20.
- except in certain cases, *ib.*
- as where attorney employed for both parties, 21.

CONVEYANCER, CERTIFICATED.

- of in general, 34.
- no direct recognition of, before 44 G. 3, c. 98, s. 14, *ib.*
- admitted on becoming a member of one of the Inns of Court, *ib.*

CONVEYANCER, CERTIFICATED—*(continued.)*

- without regard to qualification, *ib.*
- stamp duty on certificate, *ib.*
- penalty for practising without certificate, 34, 35.
- provisions of 55 G. 3, c. 184, respecting, 35.
- when duly licensed may sue for his fees, 36.
- without delivery of bill one month before action, *ib.*
- bill cannot in general be taxed, *ib.*
- unless mixed with law proceedings, *ib.*
- no regulation prescribing course of study or examination, 37.
- beyond that reposed in the benchers of the Inns of Court, 37.

CONTRACTS.

- difficult sometimes to determine who to be defendant, 49.
- of the parties in cases of, 51.
- of nonjoinder of parties, *ib.*
- defects of former law remedied, *ib.*

CONVICTION. See *Justices of the Peace.*

- general form of, prescribed by 3 G. 4, c. 23—197, 8.
- defects in, when aided, 209, 210.
- form of, under 9 G. 4, c. 31, s. 27, 134.
- shall not be void for want of form, *ib.*
- or removed by certiorari, *ib.*
- form of, under 7 & 8 G. 4, c. 29, 138.
- when before *one* justice party may appeal, *ib.*
- proceedings on appeal, 138, 9.
- not to be quashed for want of form, 139.
- or removed by certiorari, *ib.*
- to be returned to the Quarter Sessions, *ib.*
- when to be evidence in future cases, 142.
- form of under 7 & 8 G. 4, c. 30, 142.
- party aggrieved may appeal, *ib.*
- not to be quashed for want of form, *ib.*
- or removed by certiorari, *ib.*
- under 1 & 2 W. 4, c. 32, *ib.*
- proceedings before conviction considered, 182.
- when it must be before two justices, 183.
- when it would be quashed, on account of justice refusing to hear evidence, 189.
- what evidence should be stated in, 190.
- what it should contain, 196.
- should be deliberate, *ib.*
- but be completed with *due* expedition, 196.
- when defendant has a right to copy of, 197.
- should be returned to Quarter Sessions, *ib.*
- when justice liable for neglect in, *ib.*
- formal parts and requisites of, *ib.*
- in what respects imperative, consequences of deviation, 198.
- recital of information in, 198.
- usually in the past tense, *ib.*
- recital of appearance and defence, 199.
- should be stated according to fact, *ib.*
- recital of confession, 199.
- recital of evidence, *ib.*
- mode in which evidence should be stated, 200.
- evidence of each witness should be stated separately, *ib.*
- and in precise words of witness, 200.
- and not merely the result, *ib.*
- justice refusing, may be compelled to do so by mandamus, 201.
- how defence should be stated, 201.
- what evidence on face of conviction will suffice, 202.
- statement of adjudication, 203.
- form prescribed in 3 G. 4, c. 23, 203.
- must appear that a judgment was pronounced, 203.
- must be precise and certain, *ib.*
- when it should negative exceptions, *ib.*
- what statement of offence necessary, 204.
- or of defendants waiving objections, *ib.*
- must observe certainty in stating offence, 204, 5.

CONVICTION—(continued.)

when uncertainty in information aided by conviction, 205.
 statement of several offences, 205.
 adjudication as to forfeitures, &c., 206.
 as to costs, 207.
 conclusion of conviction, 208.
 the date, *ib.*
 signing and sealing, *ib.*
 when under particular statutes, 209.
 when must be in words prescribed by statute, *ib.*
 when may vary, *ib.*
 defects in, when aided, 209, 210.
 of enforcing payment under, 212.
 commitments under, 213. See *Commitments*.
 appeal against, 214. See *Appeal*.
 recognizance to prosecute appeal, 215. See *Recognizance*.
 notice of appeal, 216. See *Notice of Appeal*.
 mandamus, 217. See *Mandamus*.
 certiorari, 219. See *Certiorari*.

COPY OF CONVICTION. See *Justices of Peace*.

conviction should be returned to Quarter Sessions, 197.
 when defendant has a right to copy, 197.

COPY OF WARRANT.

when demand of, should be made, 61, 2.
 form of demand, 62.
 when unnecessary, *ib.*

COSTS. See *Attorney and Solicitor*.

when attorney &c. should have to pay, in case of neglect, 23.
 or for concealment of facts pending a negotiation, 24.
 or in annuity transaction, 32.
 when acquitted, defendant entitled to, 51.
 when allowed on bills of discovery, 54.
 will be given where demand excessive, 57.
 of retaining counsel, when allowed, 71, 72.
 on convictions, 207.
 of appeal, 217.
 recognizance to pay, on motion for *certiorari*, 225.
 defendant not entitled to, on motion for *certiorari*, *ib.*
 but is if appeal decided in his favor, 226.
 reason for this distinction, *ib.*
 in cases of forcible entry and detainer, 241.
 between landlord and tenant, when no sufficient distress. and premises deserted,
 242, 245.
 in cases of fraudulent removal to avoid distress, 246.
 in cases of excessive charges under distress warrant, 250.

COUNSEL. See *Barrister*.

duty of attorney to consult with client as to retaining of, 71.
 should retain without delay, *ib.*
 should retain such as would be certain to attend place of trial, *ib.*
 and as are most experienced, *ib.*
 of the number to retain, *ib.*
 of the allowance for, in taxing costs, *ib.*
 general retainer, when should be given, 72.
 not allowed in taxing, *ib.*
 his right to appear in summary proceedings before justices, 186, 7.

COUNSEL'S OPINION.

expediency of obtaining, 21, 32.
 when protects attorney from liability, 21, 32.
 not so if case improperly stated, 22, 32.
 or too generally, 22, 32, 3.
 requisites of counsel's opinion, 43, 4.

COURTESY.

should not be shewn to opponent, at expense of client, 25.

COURT OF EQUITY.

will restrain attorney from communicating confidential communications, 19.
 but will not restrain clerk who has commenced practice from acting as attorney
 against parties for whom his master was employed, 18.
 will in general set aside improper stipulations as to costs, &c., 28.

COVENANT. See Attorney and Solicitor.

on part of master for return of premium to articulated clerk in event of death, 9, 11.
 or other determination of service before end of term, 9, 11.
 or to pay a salary to clerk, 10.
 or that at end of term he shall be taken into partnership, 10.
 to pay widow of deceased attorney an annuity, 10. *Candler v. Candler*, 1 Jacob
 R. 231.
 that clerk shall not practise within reasonable distance, 10.
 or accept business from his master's clients, *ib.*
 or do any thing to prejudice his master, *ib.*

CRIMINAL PROCEEDINGS.

improper to refer, in cases of, 76.
 unless by consent of Court, 76.
 compromise of, 193, 4.

CRIMINAL CONVERSATION.

action for, improper to refer, 75, 6.
 except husband has no intention to seek a divorce, 76.

CUSTOMS AND EXCISE.

provisions of acts with respect to notices, 68.

DEAD LANGUAGES.

a knowledge of, essential before clerk articulated, 14.

DEATH.

bill of discovery lies to discover death of a party doubted, 53.
 provisions of 6 Anne, c. 18, to discover, 53.

DEEDS, &c.

danger of leaving them accessible to clerks, 18.

DEFECTS.

in information, when aided, 158, 170.
 in conviction, when aided, 210.

DEFENCE.

on summary proceedings before justices, 191. *See Justices of the Peace.*
 recital of, in conviction, 199.

DEFENDANT.

who to be made so, and how to ascertain, 46 to 52.
 sometimes difficult to determine who is to be, 47, 48.
 who to be, in action of ejectment, 47.
 in case of malicious injuries, 48.
 of torts or contracts, 48, 9.
 of libels, 48.
 against stage coach proprietor, *ib.*
 when necessary to file bill for discovery of, 49.
 when parties would be bound to answer, *ib.*
 when acquitted, when entitled to costs, 51.
 duty of attorney to ascertain precise party, *ib.*
 joinder and non-joinder, alterations in law, *ib.*

DELICACY.

investigation of subject of, reference proper, 75.
 unless injury to character has been sustained, *ib.*

DELIVERY.

of bill of costs, when necessary, 29, 30.
 when not, 31, 32.

DEMAND.

propriety of making, before litigation, 56.
 should be made, unless party likely to abscond, *ib.*
 of interest, when should be made, 57.
 form of such demand, *ib.*
 of precise sum, not material at law, *ib.*
 otherwise in equity, *ib.*

DEMAND—(*continued.*)

- when excessive, costs will sometimes be given, 57.
- of apology, when should be made, *ib.*
- of perusal and copy of warrant, 61.
- when should be made, *ib.*
- form of demand, 62.
- not necessary where party has not acted strictly in obedience to the warrant, *ib.*
- of return of goods, when advisable, 60.
- when to be repeated, *ib.*

DEPOSITIONS. See *Oath.***DETAINDER, 236.** See *Forcible Entry and Detainer.***DISCOVERY, BILL OF.** See *Bill of Discovery.***DISTRESS.** See *Justices of the Peace, Landlord and Tenant.*

- unreasonable costs of distress, where sum distrained for not more than 20*l.*, recoverable back before one justice, 250.
- summary proceedings when rent in arrear, 241.
- enactments in this respect, 242.
- jurisdiction given to justices, *ib.*
- in cases of fraudulent removal to avoid, 245.
- provisions of 11 Geo. 2. c. 19. s. 4, *ib.*
- for unlawful charges under distress warrant, 250.

DISTRESS WARRANT. See *Commitments, Justices of the Peace.*

- mode of enforcing penalties by, 212.
- can only be made under express enactment, 212, 13.
- no replevin lies, 213.
- goods distrained under, may be sold, *ib.*

DOCUMENTS.

- production of, before arbitrator, may be enforced, 98.

DOG.

- penalty for stealing of, 135.

EDUCATION OF ARTICLED CLERKS. See *Attorney and Solicitor. Students for the Bar.*

- should be attended to previous to binding, 10.
- should receive instruction in sciences, 12.
- their preparatory education considered, 13.
- should have had a good classical education, *ib.*
- advantages of studying the useful sciences, 14.
- the dead languages, *ib.*
- and other branches of knowledge and literature, *ib.*
- especially physics or natural philosophy, *ib.*
- knowledge of drawing useful, *ib.*
- study of biographical works recommended, 15.

EJECTMENT.

- on whose demise the action should be brought, 47.
- should not be on demise of *cestui que trust*, *ib.*
- but on demise in name of trustee, *ib.*
- when unnecessary, 231, 2.

ENLARGEMENT. See *Arbitration.*

- of time for making award, 96.
- power of, generally given to arbitrator, *ib.*
- should be made according to terms of reference, *ib.*
- or award would be void, *ib.*
- in general, discretionary in arbitrator, *ib.*
- when Court will order it, 97.
- for what it should be made, *ib.*
- form of, *ib.*

ENROLMENT. See *Attorney and Solicitor.*

- of articles of clerkship, with affidavit of execution, must be within six months, 4, 10.
- of name on rolls of Court, 5.

ENTRY. See *Attorney and Solicitor.*

- of affidavit of execution of articles of clerkship, 5.
- of notice of intention to apply for admission, *ib.*
- of name and place of abode on obtaining admission, *ib.*
- of certificate with proper officer, *ib.*

ENTRY OF NAME. See *Attorney and Solicitor*.

necessary on obtaining admission and taking out certificate, 5.

EQUITY DRAFTSMAN. See *Students for the Bar*.

his functions considered, 42.

EVIDENCE. See *Justices of the Peace*.

duty of attorney to ascertain, before commencing proceedings, 21, 46, 53.

his liability in case of negligence, 53.

who to ascertain evidence, 53, 4.

when bill for a discovery of, may be filed, 54.

or to perpetuate testimony, *ib*.

evidence before arbitrator, how to be taken and stated, 101, 2.

before justices on summary proceedings, how to be taken, 188.

oath to be administered, *ib*.

mode of examination, 189.

of taking evidence, *ib*.

should be taken verbatim, *ib*.

at least all the words material, 190.

should not be taken in the words of statute, *ib*.

should be read over to witness, *ib*.

how should be stated in conviction, 190, 200.

omission of justice to do so, observance may be compelled by mandamus, 190, 200.

must state the facts, and not merely the result, 190, 200.

what evidence on face of conviction will suffice, 201.

on appeal, fresh evidence admissible, 218.

EXAMINATION. See *Attorney and Solicitor*.

of articulated clerk previous to admission, 5, 12, 13.

by 2 Geo. 2. c. 23. s. 2, judges empowered to examine as to fitness, 12.

suggested propriety of clerks being examined by other officers, 13.

with power of appeal to judges, *ib*.

EXCEPTIONS. See *Justices of the Peace*.

when to be stated in information, 166, 7, 8.

to be proved by defendant, 167, 191.

when to be stated in conviction, 203, 4.

EXECUTORS. See *Arbitration*.

when they may consent to arbitration, 77.

should guard against personal liability, *ib*

EXEMPTIONS, 166 to 168. See *Exceptions*.**EXPEDITION.**

attorney's duty to expedite, 25.

importance of, *ib*.

EXPENCES.

impropriety of increasing, by any means, 25.

FEES. See *Attorney and Solicitor*.

stipulations relating to, considered, 26 to 32.

FISH. See *Justices of Peace*.

penalty for destroying of, 135.

FORCE. See *Forcible Entry and Detainer*.

what sufficient to justify justice's proceedings in cases of forcible entry and detainer, 234, 5.

FORCIBLE DETAINER, 236. See *Forcible Entry and Detainer, Justices of the Peace*.**FORCIBLE ENTRY AND DETAINER.** See *Justices of the Peace. Forcible Entry, Vol. 1.*

right of justices to interfere, 231.

what a forcible entry, 232, 3, 4.

even by party having a right to possession, 232.

how he should act, *ib*.

cannot take possession by force, *ib*.

when party may safely act without assistance of a justice, 233.

court of equity, in cases of wrongful possession, will grant injunction to prevent waste pending legal proceedings, *ib*.

jurisdiction of justice, *ib*.

founded on statute law, *ib*.

FORCIBLE ENTRY AND DETAINER—*(continued.)*

- two descriptions of forcible ousters, 233.
 - 1. forcible entry and expulsion, *ib.*
 - 2. forcible detainer where entry not forcible but illegal, *ib.*
- who may be guilty of a forcible entry or detainer, *ib.*
- what constitutes a forcible entry, 234.
- 1. Forcible entry and forcible detainer after such entry, 234.
 - defined and prohibited by statute, *ib.*
 - when justices may proceed to give possession, *ib.*
 - when not, *ib.*
 - must have *view* of continuing force, 234, 5.
 - when jury must be empannelled to try forcible entry, 234.
 - upon finding of force, justice may then proceed, *ib.*
 - when he may break open doors, 235.
 - and cause offenders to be arrested, *ib.*
 - justices' duty on finding force, *ib.*
 - proceedings in case there is no continuance of the force in view of justice, *ib.*
- 2. Forcible detainer, 236.
 - proceedings under, *ib.*
 - enactments respecting, 236, 7.
 - justice cannot act when wrong-doer has been continually in possession for three years, 237.
 - what a forcible detainer, 238.
 - may be whether entry forcible or not, *ib.*
 - instances of forcible detainer, *ib.*
 - between landlord and tenant, *ib.*
 - when conviction by justices insufficient for not stating that the *entry* was illegal, 238, 240.
 - decisions of the judges as to what an illegal entry under 8 Hen. 6. c. 9, 238, 9.
 - when tenant holding over guilty of illegal entry, 239.
 - in these cases prudent to try right in a civil action, *ib.*
- practical proceedings in cases of forcible entry and detainer, 240.
 - statutes give jurisdiction to *one* justice, *ib.*
 - most prudent for *two* to act, *ib.*
 - complainant should be sworn as to his right to estate, and of the forcible or illegal entry, *ib.*
 - or conviction not shewing that entry illegal, would be bad, *ib.*
 - when case doubtful, justice should not act, *ib.*
 - but leave party to try right, *ib.*
 - or should issue warrant to sheriff to impanel a jury, *ib.*
 - when offenders may traverse finding of justices, *ib.*
 - restitution should not be awarded before the jury have found force, 241.
 - or defendant decline traversing, *ib.*

FORCIBLE OUSTERS. See *Forcible Entry and Detainer, Justices of the Peace.*
are of two descriptions, 233.

- 1. forcible entry and expulsion with continuance of force, *ib.*
- 2. forcible detainer where entry only illegal, *ib.*

FORM, WANT OF.

- not to vitiate information after appearance and plea, 170.
- conviction not to be quashed for want of, 139, 142.

FORMS OF.

- articles of clerkship for more than five years recommended, 6.
- new articles to make up for lost time, 6.
- written retainer of attorney for plaintiff, 20.
- the like for a defendant, 20.
- terms of letter from plaintiff's attorney to defendant before action, 56.
- written demand of interest under 3 & 4 W. 4, c. 42, s. 28, 57.
- terms of an apology, 37.
- demand on a constable of perusal and copy of warrant, 62.
- notice of action to a justice for false imprisonment, 66.

Relating to Arbitrations.

- agreement of reference not under seal, 88.
- the like by cross bonds, *ib.*
- indenture of reference, *ib.*
- recital of general or particular grievances referred, *ib.*

FORMS OF—(continued.)

- stipulation to abide by award, *ib.*
- power to enlarge, *ib.*
- agreement that submission shall be made a rule of Court, 89.
- that parties and witnesses to be examined on oath, *ib.*
- costs of the action to abide event, *ib.*
- all other costs in discretion of arbitrator, *ib.*
- proviso that an award signed by two or three arbitrators shall suffice, *ib.*
- power to appoint fresh arbitrators or umpire, and for the latter to award without a further meeting, *ib.*
- extensive power to enlarge, *ib.*
- power to regulate or fix terms on which a nuisance may be continued, 89.
- order of reference of an indictment for nuisance, 90.
- stipulation against revocation by death, marriage, bankruptcy, &c., 90.
- stipulation that death of arbitrator shall not revoke, &c., *ib.*
- power to examine parties and witnesses on oath, *ib.*
- stipulation to state a candid and explicit account of claims and produce documents, 90.
- stipulation that arbitrator shall expressly, upon face of award, adjudicate separately upon each claim, *ib.*
- stipulation that arbitrator shall, if required, state evidence and points of law on face of award, *ib.*
- power to award costs of delay, 91.
- power to proceed ex parte in case of absence or not bringing forward evidence, 91.
- power to proceed ex parte in a fuller form, *ib.*
- agreement to prevent an executor from being liable without assets, *ib.*
- power to award the entry of a judgment to secure payment, *ib.*
- stipulated damages to be paid in case of unreasonable delay by either party, 92.
- affidavit of signature to the agreement of reference by attesting witness, *ib.*
- form of arbitrator's appointment of an umpire, 93.
- arbitrator's appointment of the first or other meeting, 94.
- appointment of peremptory and final meeting, and intention to proceed ex parte, *ib.*
- arbitrator's enlargement of time for making his award, 97.
- affidavit to obtain a judge's order or rule for a witness to attend before an arbitrator and produce certain documents pursuant to 3 & 4 W. 4, c. 42, s. 40, 99.
- judge's order thereupon for the attendance of the witness with a named document, *ib.*
- oath or affirmation to be administered by an arbitrator to a witness, pursuant to 3 & 4 W. 4, c. 42, s. 41, 101.
- award in favour of a plaintiff upon a reference of a cause and all matters in difference, 111.
- recital of order of *Nisi Prius*, *ib.*
- time enlarged, *ib.*
- hearing of parties and evidence, *ib.*
- award, *ib.*
- award under an order of *Nisi Prius* for plaintiff, but subject to facts for opinion of the Court with a report of decision of the Court thereon, 112.
- award finding facts and adjudging in form of special verdict, 113.
- award of release, 114.
- certificate instead of an award, *ib.*

Forms of Proceedings before Justices of the Peace.

- form of conviction prescribed in 9 Geo. 4, c. 91, 134.
- form in 7 & 8 Geo. 4, c. 29 and c. 30, 138.
- form of information on recent acts or on any penal statute, 156.
- complaint or information for a common assault and battery on 9 Geo. 4, c. 31, s. 27, 171.
- information on 7 & 8 Geo. 4, c. 29, s. 40, for breaking a dead fence with intent to steal same, *ib.*
- information on 7 & 8 Geo. 4, c. 30, s. 24, for a wilful or malicious injury, *ib.*
- information on Game Act, 1 & 2 W. 4, c. 32, s. 30, for a trespass in pursuit of game, 172.
- oath to obtain a summons, 173.
- summons to the defendant on a complaint or information and after oath, 177.
- warrant to apprehend to answer a summary complaint or information, 179.
- summons to a witness, 182.
- acquittal by justices, 194, n.

FORMS OF—(*continued.*)

- certificate of dismissal of complaint under 9 Geo. 4, c. 31, s. 27, 195.
- conviction prescribed by 3 Geo. 4, c. 23, s. 1, 197.
- recognizance of appeal against a conviction under the Game Act, 1 & 2 W. 4, c. 32, 215.
- judgment of affirmance of the sessions on an appeal against a conviction on the Game Act, 1 & 2 W. 4, c. 32, 216.
- notice, pursuant to 13 Geo. 2, c. 18, of an intended motion for a certiorari to remove a conviction, 223.
- affidavit in support of application for a certiorari, stating facts and objections, and also swearing to service of notice of motion, 224.

FOUND COMMITTING. See *Justices of the Peace.*

- offender under 7 & 8 Geo. 4, c. 29, may be apprehended without warrant, 136, 140.
- meaning of that term in different acts, *ante*, 1 vol. 617 to 631.

FRAUDULENT REMOVAL. See *Justices of the Peace, Landlord and Tenant, Distress.*

- summary proceedings in cases of, 245.
- provisions of 11 Geo. 2, c. 19, s. 4, *ib.*
- complaint must be in writing before two justices, *ib.*
- justices to summons parties concerned, 246, 7.
- examination to be on oath, *ib.*
- value of goods removed to be ascertained, 246.
- and parties offending to pay double the value, *ib.*
- refusal to do so, a distress warrant to issue, *ib.*
- default of distress, party to be committed for six months, *ib.*
- party appealing must enter into recognizance, &c., *ib.*
- order to be stayed pending appeal, *ib.*
- what a fraudulent removal, 246, 7.
- jurisdiction of justices, 247.
- requisites of the order, *ib.*
- advisable to be drawn up with same precision as a conviction, 248.
- oath and warrant to authorize the breaking a dwelling-house to seize goods fraudulently removed, *ib.*
- enactment of 11 Geo. 2, c. 19, s. 7, *ib.*
- caution to be observed before granting, 248, 9.

FRIENDLY SOCIETY ACT.

- arbitration* compulsory under, 74, 125.
- parties precluded from *suing* in cases within its enactments, 135, 6.

GAME ACT. See *Justices of the Peace.*

- summary proceedings under 1 & 2 W. 4, c. 32, 142.
- penalties under, 142, 3.
- distribution of penalty, 143.
- form of information stated, 172, in note.
- form of conviction prescribed, 143.
- proceedings for penalties under, 143, 147.
- conviction and commitment under, when valid, 146.

HOUSE DOVE.

- penalty for killing, &c. of, 135.

INFANT.

- cannot consent to a reference, 77.
- is subject to summary information and conviction, 152.

INFORMATION. See *Justices of the Peace.*

- within what time it must be exhibited, 147.
- provisions of different statutes, *ib.*
- month, how to be construed, *ib.*
- when the first day to be included, 147, 8.
- decisions in this respect contradictory, 148.
- who to prosecute information, 149.
- requisites to be observed, 150, 1.
- against whom, 151.
- in general before one Justice, 154.
- form and strictness required in general, 155.
- form of, 156, 171, 172.
- substance of, varies according to nature of complaint, 157.
- defects in, when aided, 158.

INFORMATION — (*continued.*)

- may be sustained in part, though bad as to residue, 158.
- surplusage, when it will not prejudice, *ib.*
- when it must be in writing, *ib.*
- when on oath, 159.
- unnecessary, if statute does not require it to be so, *ib.*
- though addition will not prejudice, *ib.*
- must be in name of proper complainant, &c., 160.
- Statement therein* of time of exhibiting same, 161.
- of *place* of exhibiting same, *ib.*
- what statements necessary, 162.
- must be made accurately, *ib.*
- or conviction would be void, *ib.*
- the *time* of committing offence, *ib.*
- advisable to state real day, *ib.*
- place of committing offence, 163.
- when local description essential, *ib.*
- when not, *ib.*
- description of offence*, 164.
- the requisite particularity, *ib.*
- when not merely in words of statute, 165.
- should be as extensive as facts will admit, *ib.*
- must state offence substantially against statute, 168.
- must be positive, 166.
- when particular words, as *wilfully*, &c., essential, *ib.*
- and not argumentative, *ib.*
- nor in the alternative, *ib.*
- when must negative exceptions or exemptions, 166 to 168.
- how should conclude, 168, 9.
- may contain several counts, 169.
- prayer, that offender may be summoned, 170.
- defects in, how aided, *ib.*
- Several forms of*, 170, 1, 2. See *Forms*.
- duty of Justice to receive information, &c., 173.
- he must correctly produce, and return the original information, 185.
- should be read to defendant if in writing, *ib.*
- or substance stated to him, *ib.*
- right of third persons to be present on hearing of, 187.
- mode of taking the evidence, 189.
- of hearing the defence, 191.
- justices may postpone the decision, 192.
- cannot enforce attendance of witness, 181.
- provisions of 1 & 2 W. 4. c. 32, in this respect, omitted in other acts, *ib.*
- recital of, in conviction, 198.
- usually in the past tense, *ib.*

INFORMER. See *Justices of the Peace*.

- in general not liable if acting *bona fide*, 227.
- otherwise if proceeding from malice, *ib.*
- not liable for errors of justice, 228.

INSPECTION OF WARRANT.

- when demand of, should be made, 61, 2.
- when unnecessary, 62.

INTEGRITY.

- when attorney guilty of want of, Court will summarily interfere, 33.
- although no suit, &c. pending, *ib.*

INTEREST.

- demand of, when should be made in writing, 57.
- form of demand, *ib.*

INTRICATE ACCOUNTS.

- in actions upon, proper to refer, 75.

JURISDICTION of Justices. See *Justices of the Peace*.

- when one justice may adjudicate, 183.
- when two are essential, *ib.*
- enactments of different statutes must be considered, *ib.*
- when he may proceed *ex parte*, 184.

JUSTICES OF THE PEACE. See *Notice of Action, Warrant.*

proctor whilst practising as such, cannot act as one, 3, 4.

I. *Of the notice of action to, and requisites, 63 to 69.* See tit. *Notice of Action.*

II. *Summary proceedings before, from information to conviction, 127 to 251.*

First, observations as to summary proceedings in general, 127.

Secondly, when in general expedient, 127, 231.

The law and practice relating to same, 127 to 250.

Jurisdiction of justices of the peace out of the sessions originally very limited, 128.

formerly their jurisdiction principally ministerial, *ib.*

except in cases of forcible entries and detainers, *ib.*

but now more extended, *ib.*

extended to cases of contract, 129.

extended to small private injuries to persons or property, *ib.*

objects of recent enactments, *ib.*

construction of statutes respecting their jurisdiction, 130, 131.

general precautions to be observed by justices, 131.

First, for a common assault or battery on 9 G. 4. c. 31. s. 27, 132.

provisions of act, 132, 3.

only applies to common assaults and batteries, 133.

and does not apply if accompanied by any attempt to commit felony, *ib.*

or where any question arises as to title to land, &c. *ib.*

or under any process of any court of justice, 134.

on oath of credible witness justice may issue summons, *ib.*

in default of appearance, on proof of due service of summons, may proceed *ex parte*, 134, 137.

or may issue warrant in first instance, 134, 137.

offences under act must be commenced within three months, 134.

form of conviction, *ib.*

shall not be quashed for want of form, *ib.*

or removed by certiorari or otherwise, *ib.*

commitment not void, when, *ib.*

proceedings must be before two justices, 135.

whose decision is final, *ib.*

construction of act, 143.

Secondly, for petty stealings of property, under 7 & 8 G. 4. c. 29, 135.

provisions of act, 135, 6, 7.

for taking or killing hare or coney in day time, 135.

stealing any dog or beast, *ib.*

killing, &c. any house dove or pigeon, *ib.*

taking or destroying fish, *ib.*

angling in day time, 136.

stealing trees, &c. *ib.*

receivers of property punishable as principals, *ib.*

and subject to same penalties, *ib.*

and recoverable before one justice, *ib.*

offenders found committing may be apprehended without warrant, *ib.*

on oath of credible witness justice may issue warrant to search for property, *ib.*

limitation of prosecutions to three months, *ib.*

party aggrieved may be a witness, 136, 137.

when so, penalty applied to county rate, 136, 137.

provisions as to proceedings for penalty, 137.

and distribution of penalty, *ib.*

punishment when penalty not paid, *ib.*

scale of punishment, 138.

when justice may discharge offender on his making satisfaction to the party grieved, *ib.*

the King may pardon offender, *ib.*

on payment of penalty or suffering imprisonment, party relieved from all further proceedings, *ib.*

form of conviction, *ib.*

when conviction before one justice party may appeal, *ib.*

proceedings on appeal, 138, 9.

conviction not to be quashed for want of form, 139.

or removed by certiorari, *ib.*

no warrant of commitment void, when, *ib.*

JUSTICES OF THE PEACE, Summary Proceedings before—(continued).

conviction to be returned to the quarter sessions, 139.
 when evidence in future cases, *ib.*
 protection of parties acting in execution of act, *ib.*
 actions, &c. against, must be laid and tried in county where committed, *ib.*
 must be commenced within six calendar months, *ib.*
 one calendar month's notice requisite, *ib.*
 defendant may plead general issue, *ib.*
 may tender amends, *ib.*
 or pay money into court, *ib.*
 costs, *ib.*
 construction of act, 144.

Thirdly, for small wilful or malicious injuries to property, under 7 & 8 G. 4. c. 30, 139.

provisions of act, *ib.*
 proceedings may be before *one* justice, 139, 140.
 who may order compensation not exceeding 5*l.*, 140.
 to be paid to party aggrieved, unless a witness, 140, 1.
 if not paid, imprisonment, with or without hard labor, not exceeding two months, 140.
 act not to apply, when, *ib.*
 not essential to prove malice, *ib.*
 persons *found committing*, may be apprehended without warrant, *ib.*
 prosecutions to be commenced within three months, 141.
 party aggrieved may be a witness, *ib.*
 charge must be upon oath, *ib.*
 abettors liable to same punishment as principal, *ib.*
 distribution of penalty when party aggrieved a witness, *ib.*
 scale of punishment, *ib.*
 discharge of offender on satisfying party aggrieved, *ib.*
 King may pardon offender, *ib.*
 no further proceedings for same cause, *ib.*
 form of conviction, 142.
 party aggrieved may appeal, *ib.*
 proceedings on appeal, *ib.*
 conviction not to be quashed for want of form, *ib.*
 or removal by certiorari, *ib.*
 or commitment held void, when, 142.
 convictions to be returned to quarter sessions, *ib.*
 when evidence in future cases, *ib.*
 provisions for persons acting *bona fide* under act, *ib.*
 construction of act, 144.

Fourthly, under Game Act, 1 & 2 W. 4, c. 32, 142.

penalties under, 142, 3.
 distribution of penalty, 143.
 form of conviction, *ib.*
 proceedings for penalties, *ib.*
 construction of act, 146.
 similarity of the several statutes of this nature, *ib.*
 conviction or commitment under, when valid, 146.

Practical proceedings to enforce compensation or penalties, 147.

First, within what time an information must be exhibited or commenced, *ib.*

provisions of different statutes, *ib.*
 month, how construed, *ib.*
 when the first day to be included, 148.
 decisions contradictory, *ib.*

Secondly, who to prosecute, 149.

enactments of the different statutes, 149, 150.
 requisites to be observed by party proceeding, 150, 1.
 summary proceedings on justice's own view, 151.

Thirdly, against whom, 151.

enactments of the statutes in this respect, 151, 2.

Fourthly, before what justice or justices, 152.

should be before justice or justices of county where offence committed, *ib.*
 when *one* justice may adjudicate, 153.
 when *two* are requisite, *ib.*

JUSTICES OF THE PEACE, Summary Proceedings before—(continued.)

proceedings before one justice, when void, 153.

information in general by one justice, 154.

though final judgment by two, *ib.*

justices not to be interested, *ib.*

Fifthly, of the information or complaint, 155.

the form and strictness required in general, *ib.*

form of information, 156.

substance of, varies according to nature of complaint, 157.

what defects in aided, 158.

information may be sustained in part though bad as to residue, 158.

surplusage, when it will not prejudice, *ib.*

substance of the usual form of information, *ib.*

when must be in writing, *ib.*

when on oath, 159.

unnecessary if statute does not require it, *ib.*

though addition will not prejudice, *ib.*

when required, illegal to act without it, *ib.*

information may be brought to the justice ready prepared, *ib.*

name and description of the complainant or informer, 160.

must be in the name of the proper complainant, &c. *ib.*

time of exhibiting the information, 161.

place of exhibiting same, *ib.*

statement of magistrate's name and jurisdiction, *ib.*

name and description of offender, 162.

must be stated accurately, *ib.*

or conviction would be void, *ib.*

time of committing offence, *ib.*

advisable to state real day, *ib.*

proof need not correspond with day named, *ib.*

place of committing of offence, 163.

when local description essential, *ib.*

when not, *ib.*

when conviction will be quashed for want of, 163, 4.

description of the offence, 164.

what particularity requisite, 164, 5.

when information on oath merely in the words of the statute will not suffice, 165.

should be as extensive as the facts will warrant, *ib.*

must charge an offence equal to that prohibited either in the express words of act or substantially so, 166.

must be positive, and not by way of recital, *ib.*

must not be argumentative, *ib.*

nor in the alternative, *ib.*

when particular words of statute essential, *ib.*

averments negating, when necessary, 166, 7.

conclusion, when should be *contra formam statuti*, 168.

when *contra pacem*, 169.

when may contain several counts varying descriptions, &c. *ib.*

prayer that the offender be summoned, 170.

defects in information when and how aided, *ib.*

forms of information, 170, 1, 2. See *Forms*.

Sixthly, oath or deposition to obtain summons, 171.

form of oath to obtain a summons, 173.

Seventhly, duty of a justice to receive an information and issue process thereon, 173.

when charge clear ought to hear information, &c. *ib.*

or Court of K. B. will compel him by mandamus, *ib.*

but not when jurisdiction doubtful, 174.

Eighthly, the summons, 174.

When it should issue before warrant, *ib.*

should be signed by justice himself, 175.

what it should contain, *ib.*

how directed, *ib.*

when it would be void, 176.

when appearance cures defect of, *ib.*

form of summons, 177.

JUSTICES OF THE PEACE, Summary Proceedings before—(*continued.*)

Ninthly, service of same, 177.

what necessary, 177, 8.

Tenthly, of the warrant to apprehend, 178.

enactments as to *transient* offenders, *ib.*

justice may issue in first instance, when, 178, 179.

must be on oath of credible witness, 178.

advisable to issue summons in first instance, *ib.*

unless offender likely to abscond, *ib.*

when statute implies authority to use compulsory means, 179.

form of warrant to apprehend, to answer a summary complaint or information, *ib.*

Eleventhly, of the search warrant, 179.

formerly could only be issued where a felony, &c. had been committed, 179, 180.

and if obtained maliciously, parties obtaining and acting under it, liable to action on the case, 180.

if illegal in form, justice liable to action of trespass, *ib.*

modern enactments respecting, *ib.*

may now be issued on oath of credible witness and proof of reasonable cause to suspect, *ib.*

course of proceedings under, *ib.*

should in general only authorize search in day-time, *ib.*

caution to be observed before issuing it, 180, 1.

Twelfthly, of securing evidence and attendance of witnesses, 181.

should be considered before hearing, *ib.*

doubtful whether justices out of session can summons witnesses, unless under express enactments, *ib.*

cannot *enforce* attendance, *ib.*

provisions of 1 & 2 W. 4, c. 32, in this respect, *ib.*

omission of in other acts, *ib.*

jurisdiction of justices imperfect for want of power, *ib.*

proper course for justices to issue summons to each witness, 182.

under Game Act witness refusing to attend, or refusing to answer, penalty 5*l.*, *ib.*

form of summons, *ib.*

Thirteenthly, hearing and proceeding before one or two justices, 182.

parties should be ready at appointed hour, *ib.*

justice should be punctual, *ib.*

proceedings before conviction considered, *ib.*

1. Jurisdiction and number of justices, 182, 3.

when one justice may adjudicate, 183.

when two are essential, *ib.*

in general, *one* may receive information, issue summons or warrant, *ib.*

though hearing and conviction must be before *two*, *ib.*

advisable to be before *two*, *ib.*

enactments of different statutes must be considered, *ib.*

2. Non-attendance of defendant and proof of due service of summons, 184.

should be satisfied of due service of summons before he proceeds *ex parte*, *ib.*

if service doubtful, should issue fresh summons, *ib.*

necessity for regularity when proceeding *ex parte*, *ib.*

especially as regards the evidence, *ib.*

3. Of confessions, 184.

when sufficient, *ib.*

when it does not aid defect in information, 185.

4. Of adjournments, 185.

when justice may adjourn, *ib.*

care to be observed before adjourning, *ib.*

5. Reading information to defendant, and his objections thereon, 185.

right of defendant to have information read when in writing, 185.

or substance stated to him when not in writing, *ib.*

if defective, defendant may object in first instance, *ib.*

and if justice proceeds, he does so at his peril, *ib.*

JUSTICES OF THE PEACE, Summary Proceedings before—(*continued.*)

- hearing must be confined to the terms of the charge in information, 185.
- when defendant should disclose his objections, 185, 6.
- 6. Right to appear by counsel or attorney, 186.
 - in preliminary examination not allowed *of right*, *ib.*
 - but may of right have the *private assistance* and attendance of counsel or attorney, 186.
 - but not to interfere as an advocate, *ib.*
- 7. Right of third persons uninterested to be present, but not to take notes, 187.
 - when justice would be liable for expelling person from justice-room, 187.
 - may prohibit the taking of notes, *ib.*
 - except on behalf of informer or defendant, *ib.*
 - if party persist, may be removed, *ib.*
- 8. The evidence and witnesses, 188.
 - sometimes express directions given by statutes, *ib.*
 - when party aggrieved may be a witness, *ib.*
 - when informer may, *ib.*
 - when not, *ib.*
- 9. Oath of witness, 188.
 - to be administered as on trial of an action, *ib.*
 - on summary proceedings evidence must be on oath, *ib.*
 - if not on oath, justice liable to a criminal information, *ib.*
 - when justice may commit for refusing to take oath and give evidence, 188.
 - when not, *ib.*
 - when he would be liable to an action of trespass for so doing, 189.
 - conviction, when it would be quashed for refusing to hear a witness, *ib.*
- 10. Mode of examination, &c. 189.
 - should be conducted as in Courts of Law, *ib.*
 - leading questions should not be put, *ib.*
 - but full investigation of truth should be obtained, *ib.*
- 11. Mode of taking evidence, 189.
 - in summary proceedings should be taken down verbatim, *ib.*
 - at least all the words material, 190.
 - but not in the words of the statute, *ib.*
 - should be read over to witness, *ib.*
 - should not be taken before witness has been sworn, *ib.*
 - provisions of 3 Geo. 4, c. 23, as to statement of evidence in the conviction, *ib.*
 - omission to do so, justice may be compelled by mandamus, *ib.*
 - evidence must state the facts, and not merely the result, *ib.*
 - when must show *particular grounds* of forfeiture, 190, 1.
 - if stated in terms different from substance, justice liable to criminal information, 191.
- 12. The defence, 191.
 - when on a criminal charge, what course the justice should pursue, *ib.*
- 13. Evidence in support of defence, 191.
 - when under *bona fide* claim of right, *ib.*
- Fourteenthly, Postponing the decision of the justices, and presence of, at the time of deciding, 192.*
 - may take time to consider, *ib.*
 - if two justices must convict, decision must be given in presence of both, *ib.*
 - and should give defendant notice when they will decide, *ib.*
 - when Court of King's Bench will interfere, *ib.*
 - if proof doubtful, defendant should have the benefit, and be acquitted, 193, 4.
- Fifteenthly, Amicable adjustments and compromises by intervention of justices, 193.*
 - when they may interfere, 193, 4.
 - or allow a compromise, *ib.*

JUSTICES OF THE PEACE, Summary Proceedings before—(*continued.*)

enactments in this respect, 193, 4.

when parties liable for compromising, 193.

Sixteenthly, Decision of the justices, 194.

1. *Acquittal*, and record or certificate thereof, *ib.*
form of acquittal, *ib.*

2. *Certificate of dismissal*, 195.
form of certificate, *ib.*

3. *Conviction*, 195, 6, 7.
what it should contain, 196.
should be deliberate, *ib.*
but be completed with *due expedition*, *ib.*
when defendant has a right to copy of, 197.
should be returned to quarter sessions, *ib.*
when justice liable for neglect, *ib.*
formal parts and requisites of, *ib.*
form of, *ib.*
in what respects imperative, and consequences of deviation, 198.

recital of information, *ib.*

usually in the past tense, *ib.*

recital of appearance and defence, 199.

should be stated according to fact, *ib.*

recital of confession, *ib.*

of evidence, *ib.*

enactments in this respect, *ib.*

mode in which evidence should be stated, 200.

evidence of each witness should be stated separately, *ib.*

and in the *precise* words of witness, *ib.*

and not merely the *result*, *ib.*

may be compelled to do so by *mandamus*, 201.

Statement of the defence and evidence for defendant, 201.

how to be stated, *ib.*

what evidence on face of conviction will suffice, 202.

the form of *adjudication* in general, *ib.*

what necessary, 203.

form prescribed in 3 Geo. 4, c. 23, *ib.*

should appear that a judgment was pronounced, *ib.*

must be precise and certain, *ib.*

when it should negative exceptions, *ib.*

what statement of the offence necessary, 204.

or of defendant's avoiding objections, *ib.*

must observe certainty in stating offence, 205.

when uncertainty in information aided by conviction, *ib.*

statement of conviction of several offences, *ib.*

of adjudication as to forfeitures, penalties, &c., 206.

as to costs, 207.

conclusion of conviction, 208.

the date, *ib.*

signing and sealing, *ib.*

Convictions upon particular statutes, 209.

when must be in words prescribed by statute, *ib.*

when may vary, *ib.*

defects in, when aided, 210.

delivery of copy of conviction, and returning same to sessions, 211

enforcing payment of penalty or punishment, 212.

when Court of King's Bench will compel justice to do so, *ib.*

when not, *ib.*

mode of enforcing same by distress warrant, &c., *ib.*

can only be done by express enactment, 212, 3.

and no replevin lies, 213.

may sell goods distrained under, *ib.*

Seventeenthly, Commitments, 213.

should strictly pursue the conviction upon which they are founded, *ib.*

deviation from, justice liable to action of trespass, 214.

must be in writing, *ib.*

JUSTICES OF THE PEACE, Summary Proceedings before—(continued.)
and not verbal, 214.

when demand of penalty should be made before commitment, *ib.*

Eighteenthly, Of Appeals to the sessions, 214.

1. When may be made, 214, 5.
cannot unless expressly or impliedly given by statute, 215.
justice's duty in respect of, 215.
2. *Recognizance*, 215.
to prosecute appeal, *ib.*
form of, *ib.*
form of judgment of affirmance of appeal, 216.
3. *Notice of appeal*, 216.
must explicitly state all the objections, 216, 7.
when must be served, 217.
when sessions quashing conviction not conclusive, *ib.*

Nineteenthly, Mandamus to compel justices to state evidence, &c. in conviction, under 3 G. 4, c. 23, 218.

when Court of K. B. will grant, *ib.*
proceedings to obtain same, *ib.*

Twentiethly, Certiorari, 219.

1. Lies as a matter of right, *ib.*
unless expressly taken away by statute, 219, 220.
when conviction may be removed by, 219, 220.
course to pursue, when certiorari taken away, 220.
within what time it must be moved for, 221.
2. What notice thereof required, 221, 222.
what it must contain, 222.
who must sign it, *ib.*
affidavit of service of notice must be made, *ib.*
how to be entitled, *ib.*
notice should specify grounds of objection, 223.
affidavit of service of notice of motion, *ib.*
3. *Affidavit* in support of motion for certiorari, 223.
how to be made, *ib.*
objections should be stated in affidavit, *ib.*
form of affidavit in support of motion, 224.
grounds on which Court will grant or refuse application, *ib.*

Recognizance to prosecute certiorari with effect, and pay penalty and costs in case of affirmance, 225.

must be entered into with two sureties, *ib.*
enactment of 5 G. 2. c. 19. s. 2, *ib.*
in what sum sureties to be bound, *ib.*

Affirmance of, or quashing conviction in K. B., 226.

if affirmed, defendant to pay costs, *ib.*
unless magistrate has refused a copy, *ib.*
if quashed, defendant entitled to have recognizance discharged, *ib.*
not entitled to costs on certiorari, if decision in his favor, *ib.*
but is on appeal in his favor, *ib.*
reason for this distinction, *ib.*

Execution to enforce conviction after being affirmed, 226.

Liability of complainant or informer, 227.

in general not liable if acting *bona fide*, *ib.*
unless acting through malice, *ib.*
liability for obtaining search warrant, *ib.*
in cases of a felonious charge, when, *ib.*
not liable for error of justice, 228.

Liability of Justices, 228.

when acting without jurisdiction, 228, 9.
or without sufficient oath of crime committed, 228.
or keeping party too long in custody, *ib.*
committing party under Vagrant Act without hearing witnesses, *ib.*
or committing for different offence than stated in conviction, *ib.*
enactments of recent acts, 228, 9.
for committing party when facts do not warrant his proceeding, 229.

JUSTICES OF THE PEACE, Summary Proceedings before—(*continued.*)

when protected by conviction not being quashed, 229.

when may be proceeded against by mandamus, *ib.*

when by criminal information, *ib.*

Protection to Justices, 230.

enactments in this respect, *ib.*

notice of action must be given, *ib.*

action, when to be commenced, *ib.*

may tender amends, *ib.*

or pay money into Court at any time before trial, *ib.*

enactments as to form of action, *ib.*

Thirdly, in cases of *Forcible Entry and Detainer*, 231.

right of justices to interfere, *ib.*

what a forcible entry, 232, 3, 4.

even by party having a right to possession, 232.

how he should act, *ib.*

cannot take possession by force, *ib.*

when party may safely act without assistance of a justice, 233.

court of equity, in cases of wrongful possession, will grant in-

junction to prevent waste pending legal proceedings, *ib.*

jurisdiction of justice, *ib.*

founded on statute law, *ib.*

two descriptions of forcible ousters, *ib.*

1. forcible entry and expulsion, *ib.*

2. forcible detainer, where entry not forcible, but illegal, *ib.*

who may be guilty of a forcible entry or detainer, *ib.*

what constitutes a forcible entry, 234.

1. *Forcible entry and forcible detainer after such entry*, 234.

defined and prohibited by statute, *ib.*

when justices may proceed to give possession, *ib.*

when not, *ib.*

must have *view* of continuing force, 234, 5.

when jury must be empannelled to try forcible entry, 234.

upon finding of force, justice may then proceed, *ib.*

when he may break open doors, 235.

and cause offenders to be arrested, *ib.*

justice's duty on finding force, *ib.*

proceedings in case there is no continuance of the force in view of justice, *ib.*

2. *Forcible Detainer*, 236.

proceedings under, *ib.*

enactments respecting, 236, 7.

justice cannot act where wrong-doer has been continually in possession for three years, 237.

what a forcible detainer, 238.

may be whether entry forcible or not, *ib.*

instances of forcible detainer, *ib.*

between landlord and tenant, *ib.*

when conviction by justices insufficient, for not stating that the entry was illegal, 238, 240.

decisions of the judges as to what is an illegal entry under 8 H. 6, c. 9, 238, 9.

when tenant holding over guilty of illegal entry, 239.

in these cases prudent to try right in a civil action, *ib.*

Practical Proceedings in cases of forcible entry and detainer, 240.

statutes give jurisdiction to *one* justice, *ib.*

most prudent for *two* to act, *ib.*

complainant should be sworn as to his right to estate, and of the forcible or illegal entry, *ib.*

or conviction not shewing that entry illegal, would be bad, *ib.*

when case doubtful, justice should not act, *ib.*

but leave party to try right, *ib.*

or should issue warrant to sheriff to impanel a jury, *ib.*

when offenders may traverse finding of justices, *ib.*

restitution should not be awarded before the jury have found force, 241.

or defendant decline traversing, *ib.*

complainant not to be a witness, *ib.*

justices to give restitution on finding of force, *ib.*

JUSTICES OF THE PEACE, Summary Proceedings before—(continued.)
and draw up record of proceedings, 241.

Certiorari to remove conviction, *ib.*

six days' notice of motion to be given, *ib.*

notice must state objections, *ib.*

proceedings same as in other cases of certiorari, *ib.*

Fourthly, In other cases between landlords and tenants, 241.

1. *Premises deserted, and rent in arrear, and no sufficient distress, ib.*

enactments in this respect, 242.

jurisdiction given to justices, *ib.*

power of appeal, *ib.*

costs on appealing, *ib.*

to what tenancies the statutes apply, *ib.*

four circumstances must concur, 242, 3.

1. a tenancy at not less than three fourths of the annual value, 243.

2. at least half a year's rent in arrear, *ib.*

3. a desertion by the tenant, *ib.*

4. neither tender of rent, nor a sufficient distress, *ib.*

practical proceedings in these cases, *ib.*

application usually in writing to two justices of the county, *ib.*

complaint need not be on oath, *ib.*

on first view, justices to affix notice, 244.

requisites of notice, *ib.*

on second view justices to give possession if defendant does not appear, &c., *ib.*

what *desertion* essential, *ib.*

justices should enquire fully into the facts, 245.

provisions of 11 G. 2. c. 19, as to justices' proceedings, *ib.*

justices not liable for proceedings, *ib.*

when landlord would be liable, *ib.*

2dly, Cases of Fraudulent Removal to avoid distress, 245.

provisions of 11 G. 2. c. 19. s. 4, *ib.*

complaint must be in writing before two justices, *ib.*

justices to summon parties concerned, 246, 7.

examination to be on oath, 246, 7.

value of goods removed to be ascertained, 246.

and parties offending to pay double the value, *ib.*

refusal to do so, a distress warrant to issue, *ib.*

default of distress, party to be committed for six months, *ib.*

party appealing must enter into recognizance, &c., *ib.*

order to be stayed pending appeal, *ib.*

what a fraudulent removal, 246, 7.

jurisdiction of justices, 247.

requisites of the order, *ib.*

advisable to be drawn up with same precision as a conviction, 248.

oath and warrant to authorize the breaking a dwelling-house to seize goods fraudulently removed, *ib.*

enactment of 11 G. 2, c. 19, s. 7., *ib.*

caution to be observed before granting, 248, 9.

3dly, Paupers retaining Parish Property, 249.

enactment of 59 G. 3, c. 112, s. 24, *ib.*

proceedings under, *ib.*

4thly, Excessive Costs of Distress, 250.

enactment of 57 G. 3, c. 93., *ib.*

when charge unlawful, justice to summon party, *ib.*

on proof of charge, to adjudge treble the amount of money unlawfully taken, *ib.*

with costs, to be levied by distress, *ib.*

other provisions of act, 250, 1.

5thly, Summary Proceedings before Justices under the Custom and Excise Laws, 251.

KING.

under 7 & 8 G. 4, c. 29 and 30, may remit penalty or imprisonment of offenders, 138, 141.

LABOURERS AND SERVANTS,

claims for and against, when referred to arbitration, 74.

LANDLORD AND TENANT. See *Justices of the Peace*.

summary proceedings by, in cases of forcible entry and detainer, 238.
 proceedings of justices, 241 to 251.

1. Where rent in arrear and premises deserted, 241.
2. In cases of fraudulent removal to avoid distress, 245 to 248.
3. Where pauper holds over after permission withdrawn, 249.
4. Excessive charges upon a distress for less than 20*l.*, 250.

LEGAL QUALIFICATION. See *Attorney and Solicitor*.

how the want of in an attorney, &c. may affect client, 15, 16.
 penalty of 50*l.* for acting without regular admission, 15.
 presence of uncertificated attorney, when insufficient, 16.
 prudence of ascertaining that party is attorney of proper court, *ib.*

LETTER.

propriety of writing before litigation, 56.
 unless party likely to abscond, *ib.*
 charge of, formerly not allowed, *ib.*
 but now otherwise, *ib.*
 terms of such letter, *ib.*

LIABILITY OF ATTORNIES. See *Attorney and Solicitor*.

in general, not liable where point of law doubtful, 31, 32.
 when acting under counsel's opinion, 21, 32.
 liable for practical errors, 33.
 in these cases remedy by action, *ib.*
 court will not summarily interfere, *ib.*
 unless when guilty of want of integrity, *ib.*
 and then although no suit, &c. pending, *ib.*

LIABILITY OF JUSTICES, 228. See *Justices of the Peace*.**LIBEL.**

in actions for in the newspapers, who to be defendants, 48.
 names of proprietors ascertained at stamp office, *ib.*
 certified copy of affidavit filed at stamp office evidence of liability, *ib.*
 but this only to proprietor or publisher, *ib.*
 printer, on giving up author, ground of mitigation of damages, *ib.*
 and suit against him should be abandoned, on payment of costs, 49.

LIEN.

when goods deposited by way of, should be stipulation for power of sale, 59, 60.
 when attorney, &c. should give notice to secure his lien, 69.

LIMITATION.

of prosecutions under 7 & 8 G. 4, c. 29. to three months, 136.
 of actions against parties bonâ fide acting under the same, six months, 139.
 of prosecutions under 7 & 8 G. 4, c. 30, three months, 141.
 commencement of. See *Proceedings between Retainer and Litigation*.
 consideration of subject in general, 46 to 72.

MAGISTRATES. See *Justices of the Peace*.**MALICIOUS INJURIES TO PROPERTY.**

summary proceedings for, 139. See *Justices of the Peace*.
 provisions of act, 7 & 8 G. 4, c. 30, 139.
 proceedings may be before *one* justice, but preferable before two, 139, 140.
 who may order compensation, 140.
 party aggrieved may be a witness, 140, 141.
 act not to apply, when, 140.
 not essential to *prove* malice, 140.
 persons found *committing* may be apprehended without warrant, 141.
 distribution of penalty, *ib.*
 scale of punishment, 141.
 form of conviction, 142.
 party aggrieved may appeal, *ib.*

MANDAMUS.

when it lies against justice, 190, 201, 229, and see *Justices of the Peace*.
 when court of K. B. will grant, 190, 201, 218, 229.
 proceedings to obtain same, *ib.*

MARRIED WOMAN.

cannot consent to a reference, 77.

MARRIAGE.

bill to discover promise of, lies, 52.

MASTER OF ARTS.

taking degree of, entitles clerk to admission as an attorney, &c. after service of three years, 8.

same exception in favour of students for the bar, 38.

MEMORANDUM.

bill of discovery lies to compel a party to admit having signed one to avoid the statute of limitations, 53.

MONTH.

how calculated, 69, 147.

when exclusive of first day, *ib.*

MORTGAGE.

goods deposited by way of, should stipulate for power of sale, 59, 60.

NEGOCIATIONS.

duty of attorney, &c. in respect of, 24.

should be conducted with candour and liberality, *ib.*

when communication should be restricted, *ib.*

when there should be no concealment, *ib.*

when attorney, &c. will have to pay costs for concealing facts, *ib.*

NEIGHBOURS.

in actions between, respecting nuisances, &c. proper to refer, 75.

NEWSPAPERS.

for libels in, who to be defendants, 48.

NON-ATTENDANCE.

of party, when arbitrator may proceed *ex parte*, 82.

of defendant, when justice may proceed *ex parte*, 184.

recital of, in conviction, 199.

NON-JOINDER, 51, 52. See Abatement.

of parties in cases of contracts, 51.

defects of former law remedied, 52.

plea of non-joinder ineffectual, where omitted party resides out of the kingdom, *ib.*

NOTARIES.

a description of law agent, 36.

antiquity of, *ib.*

exist in every state of Europe, *ib.*

peculiar weight and respect attached to their acts, *ib.*

must serve by indentures of apprenticeship for seven years, *ib.*

such indenture must be duly stamped, *ib.*

such service must be *bona fide* during whole term, *ib.*

what not a sufficient service, *ib.*

may stipulate to pay part of profits to widow or family of deceased partner, 41 G. 3, c. 76; and see more fully, *Candler v. Candler*, 1 Jac. Rep. 231, 2.

to practise, must obtain a faculty, 36.

if guilty of misconduct, may be struck of the Roll of Faculties, *ib.*

penalty of 50*l.* for practising without being admitted, *ib.*

provisions of the statutes respecting, 37.

when any attorney or solicitor may practise as notary, *ib.*

by 44 G. 3, c. 98, may draw deed, conveyance, &c. *ib.*

but not be concerned in any suit, *ib.*

NOTICE.

of intention to apply for admission to practise as an attorney, &c. 5.

must be affixed outside the Court, *ib.*

and entered at Judge's chambers, *ib.*

of lien, when necessary, 69, 70.

NOTICE OF ACTION. See Justices.

precautions to be observed in giving, 60.

of action, and requisites, 63.

regulations with respect to notices in general, *ib.*

to justices in particular, *ib.*

provisions of 24 G. 2, c. 44, with respect to, *ib.*

decisions on the statutes, 64.

the intended writ must be stated, 65.

what it must state, *ib.*

precision and technicality not requisite, 66.

recommended form of, *ib.*

NOTICE OF ACTION (*continued*).

- should be nearly in form of subsequent declaration, 67.
- legal objections need not be stated, *ib.*
- form of action need not be stated, *ib.*
- to whom to be addressed, *ib.*
- on whom to be served, *ib.*
- indorsement on notice of attorney's name and abode, 68.
- why requisite, *ib.*
- what a sufficient description, *ib.*
- under 7 & 8 G. 4, c. 29 and 30, one calendar month's notice of must be given, 139, 141.

NOTICE OF APPEAL.

- when appeal may be made, 214.
- must explicitly state all the objections, 216, 217.
- when must be served, 217.

OATH.

- to be taken by clerk on admission to practise as attorney, &c. 5.
- only to be administered when Judge satisfied of fitness, 5, 13.
- form of, to obtain a summons, 173. See *Justices of the Peace*.
- before summons requisite, under four recent acts, 173, 4.
- form of, 173.
- warrant to apprehend must be on oath of credible witness, 178.
- search warrant must be obtained on oath, 180.

OFFENCE.

- how to be stated in information, 164 to 168. See *Justices of the Peace*.
- how to be stated in conviction, 205. See *Justices of the Peace*.

ORDER OF REFERENCE. See *Arbitration*.

- when may be amended, 89.
- when may be revoked, 102.

PARTNERS.

- one of several may consent to a reference, but not to bind his partners, 77.

PART PAYMENT.

- when proposal of, may be accepted, 59.

PARTY AGGRIEVED.

- when he may be a witness, 136, 7.
- when so, penalty applied to county rate, &c. 137, 141.

PENALTY. See *Justices of the Peace*.

- proceedings for, under 7 & 8 G. 4. c. 29 & 30, 135, 139.
- party aggrieved may be a witness, 136, 7.
- when so, penalty applied to county rate, &c. 136, 7.
- provisions as to proceeding for, 137.
- distribution of, *ib.*
- punishment when penalty not paid, 138.
- form of conviction for, *ib.*
- when the King may remit, *ib.*
- proceedings for under 1 & 2 W. 4. c. 32, 142.
- practical proceedings to enforce, 147.

PERJURY.

- party guilty of false swearing before arbitrator, guilty of perjury, 98.
- formerly otherwise, 98, 100.

PERUSAL OF WARRANT.

- when demand of, should be made, 62.
- when unnecessary, *ib.*

PETITION.

- in cases of difficulty articulated clerk may petition Court, 5, 13.
- whose decision will be final, 13.
- and no court of appeal or higher tribunal, *ib.*

PHYSICS AND NATURAL PHILOSOPHY.

- study of, particularly recommended, 14.

PIGEON.

- penalty for killing or wounding of, 136.

PLAINTIFF.

- considerations who to be, 47, 48.
- how to discover proper party, 47, 48.

PLAINTIFF—(continued).

who to be, in action of ejectment, 47.

assignee of bond or chose in action must sue in name of obligor, *ib.*

PLEADINGS.

barrister's, &c. duty with respect to, 44, 45.

should not be incumbered with unnecessary statements, 44.

or contain complicated counts or pleas, *ib.*

though sometimes unavoidable, *ib.*

POSSESSION. See *Forcible Entry and Detainer. Justices of the Peace.*

summary proceedings before justices, when withheld by forcible entry and detainer, 231 to 242.

PRACTICE. See *Attorney and Solicitor.*

attorney, &c. liable for errors in, 33.

PRECAUTIONARY PROCEEDINGS.

between retainer of attorney and commencement of legal proceedings, 46 to 72. See tit. *Proceedings between Retainer and Commencement of Litigation.*

PRECEDENTS. See *Forms.***PREMIUM.**

articles of clerkship should contain covenants for return of, in case of death of master, 9.

or other event, *ib.*

when Court of K. B. will compel return of, 10.

without resorting to a court of equity, *ib.*

PRINTER.

of libel giving up author, ground of mitigation of damages, 49.

suit against him should be abandoned on payment of costs, *ib.*

PROCEEDINGS BEFORE JUSTICES. See *Justices of the Peace.***PROCEEDINGS BETWEEN RETAINER AND COMMENCEMENT OF LITIGATION, 46 to 72.**

consideration of subject in general, 46.

Fifteen steps may be necessary, as follows, 46 to 72.

First, ascertain the party injured, and who to sue, 47, 48.

sometimes difficult to determine, 47.

in actions of ejectment, on whose demise, *ib.*

cannot be on demise of cestui que trust, *ib.*

but must be on demise in name of trustee, *ib.*

assignee of bond or chose in action must sue in name of obligee, *ib.*

except on a bill or note, *ib.*

who to sue and be sued requires consideration, *ib.*

as error would in general be fatal on trial, *ib.*

attorney should secure proper authority to sue, *ib.*

duty of executors and administrators where claimant unknown, *ib.*

and expediency of public advertisements, *ib.*

course to pursue when title deeds, &c. in possession of agent, &c., 48.

Secondly, who to be sued, 48.

sometimes difficult to determine, *ib.*

as in the case of malicious injuries, *ib.*

necessity of sufficient discovery before proceeding, *ib.*

in cases of torts or contracts, advisable to advertise, *ib.*

but must avoid libellous expressions, *ib.*

for a libel in newspaper, by referring to affidavit filed at Stamp Office, *ib.*

certified copy of which, evidence of liability, *ib.*

but this only to proprietor or publisher, *ib.*

when against stage coach proprietor, *ib.*

printer of libel giving up author, ground of mitigation, *ib.*

and suit against him should be abandoned on payment of costs, 49.

of bill to perpetuate testimony when wrong doer unknown, *ib.*

difficulties in cases of contracts, *ib.*

of writing letter to party supposed to be liable, *ib.*

either to make compensation, *ib.*

or to disclose name of offender, *ib.*

when necessary to file bill for discovery, *ib.*

when parties would be bound to answer, *ib.*

when landlord may file a bill for discovery against tenant, *ib.*

when not, *ib.*

PROCEEDINGS BETWEEN RETAINER AND COMMENCEMENT OF LITIGATION—*(continued.)*

- bill lies against lessee and mortgagee, when, 50.
- of the *right* to obtain a discovery of the parties to be made defendants, *ib.*
- would not be enforced when on face of bill *no remedy*, *ib.*
- of joining defendants in actions of trespass, 51.
- when acquitted, defendants, by 8 & 9 W. 3. c. 11, entitled to costs, *ib.*
- entitled, unless judge certify to contrary, *ib.*
- provisions of that statute extended to all *personal actions*, *ib.*
- duty of attorney to ascertain precise parties, *ib.*
- of the parties in cases of contracts, *ib.*
- in the case of nonjoinder *ib.*
- defects of former law remedied, 52.
- plea of nonjoinder ineffectual where omitted party resides out of kingdom, *ib.*
- Thirdly, of the cause or ground of action, and how to be ascertained*, 52.
- duty of attorney to ascertain this, *ib.*
- when bill of discovery should be filed, *ib.*
- as to compel defendant to admit or deny a promise of marriage, *ib.*
- or having signed memorandum, *ib.*
- or to discover assets, *ib.*
- or to exhibit an account of assets and expenditure in the Ecclesiastical Court, 53.
- doubtful whether it lies to discover whether a particular person exists, *ib.*
- or where he resides, *ib.*
- provisions of 6 Ann, c. 18, to discover death of party, *ib.*
- Fourthly, ascertaining the evidence*, 53, 212.
- should be ascertained in first instance, 53.
- even before intimation to opponent of intended litigation, 53.
- duty of attorney in this respect, *ib.*
- his liability in case of negligence, *ib.*
- danger of relying merely on client's statement, *ib.*
- safest course to examine the principal witnesses, *ib.*
- when bill for a discovery may be filed against defendant, 54.
- or to perpetuate testimony, *ib.*
- Fifthly, of bills for discovery, and costs thereon*, 54.
- principal points in connexion with proceedings considered, *ib.*
- when bill prays only a discovery, and not relief, plaintiff not to have costs, *ib.*
- but defendant entitled to his costs, *ib.*
- reason for this rule, *ib.*
- when a different rule would prevail, *ib.*
- Sixthly, demand of a legal security in lieu of one defective*, 55.
- essential to know if written security sufficient, *ib.*
- and properly stamped, *ib.*
- when bill necessary to enforce delivery of proper security, *ib.*
- when may sue at law for not giving it, *ib.*
- demand of one should be first made, *ib.*
- when stamp omitted, may be impressed at any time, 56.
- except in cases of bills and notes, *ib.*
- better to delay that expense until necessary, *ib.*
- Seventhly, Attorney's letter before action*, 56.
- propriety of doing so considered, *ib.*
- unless party likely to abscond, *ib.*
- omission engenders angry feelings, *ib.*
- formerly charge of such letter not allowed, *ib.*
- but now otherwise, *ib.*
- terms of such letter, *ib.*
- when demand of interest should be made, 57.
- form of such demand, *ib.*
- at law, demand of the precise sum not material, *ib.*
- but otherwise in equity, *ib.*
- when costs will be given where demand excessive, *ib.*
- Eighthly, Of Proposals for an Apology or Compromise*, 57.
- propriety of asking for apology or compromise, *ib.*
- duty of attorney to afford opportunities for, *ib.*
- humiliating one should not be asked, *ib.*

PROCEEDINGS BETWEEN RETAINER AND COMMENCEMENT OF LITIGATION—(continued.)

compromise may be invited on both sides, 58.
 should be *bona fide* and fairly conducted, *ib.*
 costs sometimes affected by, *ib.*
 of compromise in criminal cases, *ib.*
 in compromise at law, where several claimants must concur, *ib.*
 different rule prevails in equity, *ib.*
 when sufficient for majority to agree, 59.

Ninthly, Of giving time, and on what security, 59.
 attorney bound to communicate offer to his client, *ib.*
 when proposal of part payment may be accepted, *ib.*
 when time given to principal, consent of surety should be obtained, *ib.*
 or time given, on obtaining security of third person, the consideration should be mentioned, *ib.*
 in case of several contracting, covenants should be several as well as joint, *ib.*
 when goods deposited by way of mortgage or lien, should stipulate for power of sale, 59, 60.
 when warrant of attorney or cognovit proposed, 60.
 course to be observed in a case of general insolvency, *ib.*

Tenthly, Of Notices, Tenders, and Demands in general, 60.
 when demand of goods, &c. advisable, *ib.*
 when such demand should be repeated, *ib.*
 precautions to be observed in giving notices in general, *ib.*

Eleventhly, Of Demand of perusal, and copy of Justice's Warrant, 61.
 when should be made, 61, 2.
 when officer is protected, 61.
 when magistrate liable, *ib.*
 when not, *ib.*
 provisions of 24 G. 2, c. 44, *ib.*
 form of demand, 62.
 no demand necessary where party has not acted strictly in obedience to the warrant, *ib.*
 when the immediate wrong doer should be proceeded against, 63.

Twelfthly, Of the Notice of Action, and requisites, 63.
 enactments with respect to notices in general, *ib.*
 notices to justices in particular, *ib.*
 provisions of 24 G. 2, c. 44, *ib.*
 decisions on the statutes, 64.
 who a justice within the act, *ib.*
 person illegally acting as a justice without qualification is not within the act, *ib.*
 construction of words "done in the execution of his office," *ib.*
 the intended writ must be stated, 65.
 slight want of technicality will not prejudice, *ib.*
 what facts and damage must be stated, *ib.*
 no evidence allowed of cause of action not named in notice, *ib.*
 precision and technicality not requisite, 66.
 recommended form of notice, *ib.*
 should be nearly in form of subsequent declaration, 67.
 legal objections need not be stated, *ib.*
 form of action need not be stated, *ib.*
 but if stated, and subsequent declaration vary, the latter would be insufficient, *ib.*
 to whom should be addressed, *ib.*
 on whom served, *ib.*
 indorsement on notice of attorney's name and abode requisite, 68.
 why requisite, *ib.*
 what description sufficient, *ib.*
 provisions of the Customs and Excise Acts, *ib.*
 other peculiar protections, *ib.*
 when the month expires, 69.
 general precautions, *ib.*

Thirteenthly, Notice of Attorney's Lien, 69.
 when should be given, *ib.*
 effect of such notice, 69, 70.

PROCEEDINGS BETWEEN RETAINER AND COMMENCEMENT OF LITIGATION—*(continued.)*

Fourteenthly, Selection of Remedy, 70.

importance of question, 70, 71.

an *arbitration* least hostile, *ib.*

summary proceedings before justices most expeditious and less expensive, 70.

or in Courts of Request, 70.

or by action at common law, *ib.*

or by indictment or information in Criminal Courts, *ib.*

Fifteenthly, Of Retaining Counsel, 71.

duty of attorney to consult client in this respect, *ib.*

should be effected without the least delay, *ib.*

which counsel to retain, *ib.*

of the number to retain, *ib.*

of the allowance for retainer in taxing, 71, 72.

general retainer, when should be given, 72.

not allowed in taxing, 72.

PROCTOR. See *Attorney and Solicitor.*

liable to the same regulations as to admission as attorneys and solicitors, 34.

must serve five years under articles, *ib.*

must be examined and admitted, *ib.*

and obtain an annual certificate, *ib.*

prohibited from suffering unqualified person to use their names, *ib.*

cannot act as a justice of the peace, *ib.*

observations of Lord Stowell as to their duty, 23, 24, 34.

PROFESSIONAL BUSINESS.

when an attorney cannot charge for, 17.

PROMISE OF MARRIAGE.

bill of discovery lies to compel defendant to admit or deny a promise of marriage, 52.

PROOF OF FACTS. See *Evidence.*

duty of attorney to ascertain them, before proceeding, 21.

should be well assured of their sufficiency, *ib.*

Lord Tenterden's observations of attorney's duty in this respect, *ib.*

when attorney, &c. should take counsel's opinion on, 22.

PROPOSAL FOR TIME. See *Time.*

PROSPECTIVE MORTGAGE.

attorney, &c. cannot take, to receive *future* costs, 27.

PROTECTION TO JUSTICES, 230. See *Justices of the Peace.*

PROTHONOTARY.

service of articulated clerk to, sufficient, 7.

PUBLIC LECTURES.

revival of, at the Inns of Court, recommended, 40.

PUBLICATION.

of an award, what, 115.

PURCHASER.

should not employ vendor's attorney, 17.

RECEIVER.

of stolen property punishable as principal, 136.

RECOGNIZANCE. See *Justices of the Peace.*

to prosecute certiorari with effect, &c., 225.

must be entered into with two sureties, *ib.*

enactments of 5 G. 2, c. 19, s. 2, *ib.*

in what sum sureties to be bound, *ib.*

to prosecute appeal against decision of justices, in cases of fraudulent removal of goods, 246.

if conviction quashed, entitled to have recognizance discharged, 226.

REMUNERATION. See *Attorney and Solicitor.*

stipulations by attorney, &c. out of usual course, illegal, 26.

REFERENCE. See *Arbitration, Reference to.*

when proper, 75.

in cases of intricate accounts, *ib.*

REFERENCE—(*continued.*)

- or where necessary to refer to long documents, 75.
- or to make or explain calculations, *ib.*
- between neighbours respecting nuisances, ancient lights, &c., *ib.*
- or upon title to land, if claim small, *ib.*
- in investigating subjects of delicacy amongst relations, *ib.*
- unless character injured, *ib.*
- when improper, 75.
 - in cases of calumny, *ib.*
 - or criminal conversation, 75, 6.
 - in criminal matters, unless by consent of Court, 76.
 - in other cases, *ib.*
 - caution to be observed in terms of reference, *ib.*
- who may refer, 77.
 - an infant or married woman cannot, *ib.*
 - one of several partners may, but not to bind his partners, *ib.*
 - agents in general must have express power to do so, *ib.*
 - at law, counsel or attorney may bind client by consenting to refer at nisi prius, *ib.*
 - in equity, solicitor cannot, unless by express authority, *ib.*
 - when executors, &c. may, *ib.*
 - should guard against personal liability, *ib.*
 - when assignees should refer, *ib.*
 - should guard against personal liability, 78.
- utility of reference, to find facts for opinion of Court, 78.
 - by having facts concisely stated by arbitrator, *ib.*
 - parties enabled to do this by recent acts, *ib.*
- distinctions between references at common law and under the statutes, 79.
 - at common law, may be verbal, *ib.*
 - or in writing, not under seal, *ib.*
 - or by specialty, *ib.*
 - or by rule or order of a Judge, *ib.*
 - enactments of 9 & 10 W. 3. c. 15, 80.
 - of 3 & 4 W. 4. c. 42. s. 39, 40, 41,—82.
- submission to, and terms thereof, 85.
 - care in framing requisite, *ib.*
 - should stipulate that submission be made a rule of Court, 86.
 - should be made in writing, *ib.*
 - when by agent or trustee, to avoid personal liability, 87.
 - by executors, assignees, &c., 87.
 - of limiting power of arbitrator, *ib.*
 - when may be amended, 89.
 - making submission a rule of Court, 92.
 - when may be made, *ib.*
 - enlargement of time, 96.
 - proceedings before arbitrator, 97.
 - enforcing attendance of witnesses, 98.
 - examination of witnesses and evidence, 101.
 - mode of taking the evidence, 102.
 - when agreement to, may be revoked, *ib.*
 - provisions in agreement to refer as to costs, 109, 10.

REPLEVIN.

- does not lie under a Justice's distress warrant for a penalty, 213.

RETAINER of Attorneys, &c., 1 to 20.

- reasons why an admitted legal agent should be retained, 1 to 4.
- of attorney or solicitor, 4.
- rules for client's selection of attorney, 17, 18.
- propriety of requiring a written retainer, 18.
- formerly absolutely requisite, 19.
- but not so now, *ib.*
- omission to take one censured, *ib.*
- and would create prejudice against attorney, *ib.*
- observations of Lord Tenterden on this subject, *ib.*
- should be given for the client's sake, *ib.*
- and qualified according to deliberate intention of party, *ib.*
- necessary, when on behalf of assignees of bankrupt, 20.
- and should be signed by all of them, *ib.*
- should stipulate to attorney's due care in ascertaining title, *ib.*

RETAINER of Attorneys, &c.—(continued.)

with engagement to make satisfaction upon the discovery of any defect, 20.

this to avoid the Statute of Limitation, *ib.*

form of retainer on behalf of plaintiff, *ib.*

on behalf of defendant, *ib.*

duty of attorney to secure authority to sue or defend, from proper party, 47.

RETAINING COUNSEL. See *Counsel, retaining of.*

duty of attorney respecting, 71, 2.

REVOCATION of power of arbitrator. See *Arbitration, reference to.***SALVAGE ACTS.**

claims under, referred to arbitration, 74, 125.

but not preclude parties from suing, 125.

SAVING BANK ACT.

arbitration under compulsory, 74, 125.

parties precluded from suing, in cases within its enactments, 126.

SEAMEN'S WAGES.

claims for, referred to arbitration, 125, 74.

SEARCH WARRANT. See *Warrant. Justices of the Peace.*

when Justice may issue, 136, 179.

if illegal in form, Justice liable to action of trespass, 180.

modern enactments respecting, *ib.*

may now be issued on oath of credible witness, and proof of reasonable cause to suspect, *ib.*

how to proceed under, *ib.*

should in general only authorize search in day time, *ib.*

caution to be observed before issuing it, 180, 1.

SECONDARY.

of Superior Courts, service of articted clerk to, sufficient, 7.

SECURITIES for client. See *Attorney and Solicitor.*

attorney's, &c. duty to obtain, 25.

when arrangement beneficial to client, he should instantly obtain written agreement, *ib.*

lest party fly from engagement, *ib.*

SECURITY.

when legal one may be demanded in lieu of defective one, 55.

essential to know if sufficient, *ib.*

and properly stamped, *ib.*

when bill necessary to enforce delivery of, *ib.*

remedy at law for not giving, *ib.*

of demand of, before proceeding, *ib.*

of requiring security, and defendant's offer of same, 59.

attorney bound to communicate offer to his client, *ib.*

SERVICE of Articted Clerk. See *Attorney and Solicitor. Clerkship, Articles of. Articted Clerks.*

affidavit of regular service necessary, 5, 6, 7, 10.

must be a service altogether of five years, 7.

but need not absolutely be *continuous*, *ib.*

must be to a *bona fide* practising attorney, &c. *ib.*

and practising on his own account, *ib.*

and not serving as clerk or writer to another attorney, *ib.*

neglect of master to take out certificate will not invalidate service of clerk, *ib.*

may be to a prothonotary or secondary of Superior Courts, *ib.*

or to the Master of the Crown Office, *ib.*

exceptions as to *time* of service, 8.

as where proposed clerk has taken the degree of Bachelor of Arts or Law, then service of three years will suffice, *ib.*

enactments of 1 & 2 G. 4, c. 48. s. 2, *ib.*

what service and affidavit of service essential, 10 to 12.

SIX YEARS.

advantages of a clerk being articted for, 5, 7, 14, 15.

SMALL STEALINGS. See *Justices of the Peace.*

proceedings for under 7 & 8 G. 4. c. 29, 135.

provisions of act, 135, 6, 7.

SOLICITOR AND ATTORNEY. See *Attorney and Solicitor*.

SPECIAL PLEADER. See *Students for the Bar*, 37.

his antecedent education and studies, 37 to 42.

his functions considered, 42.

STAMP.

on articles of clerkship, 4.

on admission to practise as an attorney, &c. 5.

when necessary on fresh articles, 7.

when commissioners will return same, *ib.*

on certificate of attorney, 5.

of proctor, 34.

of conveyancer, 34, 5.

of notary, 36.

of special pleader.

on indentures of apprenticeship to serve as a notary, 36.

STATUTE OF LIMITATIONS.

engagement by attorney to make satisfaction upon *discovery* of defect of title, to avoid effect of, 20.

STIPULATIONS.

by attorney for remuneration out of usual course, illegal, 26, 28.

may stipulate for advance where result doubtful, 26.

or require guarantee of third person, *ib.*

which should be in writing, expressing consideration, 27.

to abide the event, improper, *ib.*

or to receive part of estate recovered, *ib.*

or a named sum in case he should recover, 28.

court of equity will in general set these aside, *ib.*

STUDENTS FOR THE BAR.

in general, 37.

no precise course of study or examination prescribed, *ib.*

beyond what *might* be enjoined by the benchers of each inn, 37.

of which he must become a member, *ib.*

term requisite to be a member before he can practise, 38.

exception in favor of Bachelor of Laws or Master of Arts, *ib.*

of keeping terms, *ib.*

when must deposit 100*l.*, *ib.*

formerly public lectures given, 39.

but latterly discontinued, *ib.*

in the Inner Temple, examination takes place before admitted even as a student, *ib.*

propriety of such regulation, *ib.*

must obtain a certificate of approbation before he can be called to the bar, *ib.*

legal qualification rarely attended to by the benchers, *ib.*

what misconduct or moral delinquency would exclude, *ib.*

may appeal to the twelve judges when admission refused, *ib.*

such appeal rarely successful, 39, 40.

revival of public lectures recommended, 40.

but substantial knowledge best attained by private study, *ib.*

causes of failure at the bar considered, 41.

course of study recommended, 41, 2.

other attainments beyond the law requisite, 41, 2.

SUBMISSION to Arbitration. See *Arbitration*, reference to.

care required in framing terms of, 85.

should stipulate to be made a rule of Court, 86.

should be in writing, *ib.*

or not within the act, *ib.*

or may be revoked, 87.

when by agent or trustee, *ib.*

by executors, administrators, &c. 88.

should limit power of arbitrator, 87.

when may be amended, 89.

of making submission rule of Court, 92.

may be made before or after award, *ib.*

in vacation as well as in term, *ib.*

advisable to be made a rule of Court immediately, *ib.*

SUMMONS.

- form of oath to obtain one, 173.
- when it should issue before warrant, 174.
- should be signed by Justice himself, 175.
- what it should contain, *ib.*
- how be directed, *ib.*
- when it would be void, 176.
- when appearance cures defect of, *ib.*
- form of summons, 177.
- what service necessary, 177, 8.
- form of summons to a witness under Game Act, 182.
- penalty 5*l.* for refusing to attend, *ib.*
- in case of non-attendance, how Justice to proceed, 184.
- on proof of due service may proceed *ex parte*, *ib.*
- if doubtful, should issue fresh summons, *ib.*

SURETY.

- consent of, should be obtained before giving time to principal, 59.

SURPLUSAGE.

- in information, when it will not prejudice, 158.
- in convictions, the same rule, 210.

TENANT, 241 to 251. See *Landlord and Tenant. Justices of the Peace.*

TENDER.

- on a bill of costs, when it should be made, 31.

TENDER OF AMENDS.

- party proceeded against for any thing done in execution of 7 & 8 G. 4. c. 29 & 30, may tender amends, 139, 141.

TIME. See *Enlargement of Time.*

TIME, Proposal for.

- attorney bound to communicate proposal for to his client, 59.
- when given to principal, consent of surety should be obtained, *ib.*
- or in security of third person, the consideration should be expressed, *ib.*

TITLE, DEFECT OF.

- engagement by attorney to make satisfaction on *discovery* of, 20.
- this to avoid effect of statutes of limitations, *ib.*

TREES.

- penalty for stealing of, 136.

UMPIRE.

- appointment of, in reference, 93.
- should be appointed before disagreement, *ib.*
- may make award after refusal of arbitrator to proceed, *ib.*
- but in general not before, *ib.*
- how he should be appointed, *ib.*
- form of appointment of one, *ib.*

UNQUALIFIED PERSON. See *Attorney and Solicitor.*

- cannot sue for business done as an attorney, &c., 15.
- prohibited from using proctor's name, 34.

USEFUL SCIENCES.

- advantages of studying before being articled to an attorney, &c., 13.

USURY ACTS.

- provisions of with regard to solicitors, &c. procuring loan of money, 32.
- penalties under the same, *ib.*
- provisions of sometimes evaded, *ib.*
- when security invalidated, *ib.*

WANT OF FORM.

- conviction when not to be quashed, 139, 142.

WARRANT OF JUSTICES. See *Justices of the Peace. Search Warrant.*

- demand* of perusal and copy of, 61.
- when should be made, 61, 2.
- when officer protected by, 61.
- magistrate, when liable, *ib.* 228 to 231.
- when not, *ib.*
- form of demand of copy of, 62.

WARRANT OF JUSTICES—*(continued.)*

- not necessary when party has not acted strictly in obedience to, 62.
- to apprehend, 178.
 - enactments as to transient offenders, *ib.*
 - when may be issued in first instance, *ib.*
 - must be on oath of credible witness, *ib.*
 - advisable to issue summons in first instance, *ib.*
 - unless offender likely to abscond, *ib.*
 - form of warrant, 179.

WARRANT OF ATTORNEY.

- executed in presence of uncertificated attorney, when insufficient, 16.

WITNESSES.

- bill to perpetuate testimony of, 49, 54.
- before arbitrator*, how to enforce attendance, 98, 99.
- tender of expense must be made, 95, 98.
- form of affidavit to obtain order or rule, 99 n. (s).
- judge's order thereon, *ib.*
- arbitrator's swearing witnesses, 100.
- examination of *before arbitrator*, 101.
- oaths of, *ib.*
- mode of taking their evidence *before arbitrator*, 102.
- falsely swearing *before arbitrator* may be indicted for perjury, 98.
- before justices*, securing evidence and attendance, 181.
 - form of summons to witness, 182.
 - evidence, 188.
 - oath of witnesses, *ib.*
 - mode of examination, 189.
 - mode of taking down evidence, *ib.*
 - recital of evidence in conviction, 199.
 - mode of stating in conviction, 200.
 - statement of evidence for defendant, 201.
 - what evidence on face of conviction will sustain it, 202.
- on appeal,
 - fresh evidence may be given, 218.
- on proceedings for a forcible entry or detainer, 241.
 - party interested not a witness, *ib.*

WRITER OR CLERK. See *Attorney and Solicitor.*

- service of articulated clerk to attorney, &c., serving as writer, &c. to another attorney insufficient, 7.

WRITTEN RETAINER. See *Retainer. Attorney and Solicitor.*

- propriety of giving one considered, 18.
- though not absolutely requisite, 19.

WRONGFUL POSSESSION. See *Justices of the Peace. Forcible Entry and Detainer.*

- summary proceedings *before justices* in cases of, 231 to 241.

THE
PRACTICE OF THE LAW
IN
ALL ITS DEPARTMENTS;
WITH A VIEW OF
RIGHTS, INJURIES, AND REMEDIES,

AS AMELIORATED BY RECENT STATUTES, RULES, AND DECISIONS;

SHOWING

THE BEST MODES OF CREATING, PERFECTING, SECURING, AND TRANSFERRING RIGHTS;

AND

**THE BEST REMEDIES FOR EVERY INJURY, AS WELL BY ACTS OF PARTIES THEMSELVES,
AS BY LEGAL PROCEEDINGS; AND EITHER TO PREVENT OR REMOVE INJURIES;
OR TO ENFORCE SPECIFIC RELIEF, PERFORMANCE, OR COMPENSATION:**

AND

THE PRACTICE
**IN ARBITRATIONS; BEFORE JUSTICES; IN COURTS OF COMMON LAW;
EQUITY; ECCLESIASTICAL AND SPIRITUAL; ADMIRALTY;
PRIZE; COURT OF BANKRUPTCY; AND COURTS OF
ERROR AND APPEAL.**

WITH NEW PRACTICAL FORMS.

INTENDED AS

A COURT AND CIRCUIT COMPANION.

—
IN TWO VOLUMES.

—
PART IV.

—
BY J. CHITTY, ESQ.
OF THE MIDDLE TEMPLE, BARRISTER.

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P R E F A C E

TO

PART FOURTH.

I HAVE endeavoured in the following pages to give a comprehensive view of “ *The Science of Practice*,” as distinguishable from the mere routine of issuing and serving a writ, delivering or filing a declaration, &c. which may generally be conducted by a clerk of comparatively little knowledge or experience. My reason for publishing this part *separately* from that relating to *mere practice* is, that it may be found more extensively interesting and useful, not only to *all legal Practitioners*, but also to the *Public*, than the mere detail of practice; and that consequently many may wish to possess it as a *separate work*, without being incumbered with the latter. Every Barrister, Pleader, Solicitor, Attorney or Proctor, whatever department of the Law he may pursue, is, or ought to be, anxious to *combine* so much knowledge of the jurisdiction and course of Practice of *all the Fourteen principal Courts of Justice*, and to be so accustomed to *compare them* as regards their utility, as to enable him *promptly* to advise his client which *remedy* is, under the circumstances of his case, *preferable*; whilst at present too frequently a *Common Law* Barrister or Attorney recommends a remedy in the Court where he practises, and the *Chancery* Barrister, or Solicitor, prefers a Court of Equity; and the Doctors and Proctors naturally think most favourably of their own Courts, although there are con-

stantly better remedies elsewhere. And addressing myself to the *Public*, or at least to those *private individuals* who have property or rights to protect or defend, I assure them that very frequently success in a suit or proceeding depends on a *client* being able somewhat to *judge for himself*, though he should not absurdly do more than *suggest*, and rarely interfere after the particular remedy has been decided upon. All understand and admit the force of the well known maxim, that after attaining a certain age, every man is either “a fool or his own Physician,” and every experienced Physician knows that frequently the Patient suggests to him a remedy or a regimen which he finds it expedient to adopt. So in Law, if *Private Gentlemen* would inform themselves of the Outline of *Remedies* and the *Principles of Practice*, they would frequently secure a welcome result, which might otherwise be endangered; and I therefore invite their attention at least to so much of the following pages as may be applicable to their situation.

Be this, however, as it may, forty years’ experience has taught me how narrow and limited are my own legal attainments, and to induce me to think that many legal Practitioners are very frequently called upon to advise upon branches of Law, with which they are too little informed to enable them scarcely with integrity or propriety to advise upon the case, and still less upon the practical remedy. Many years ago, therefore, I resolved, as well for my own assistance as for the use of my pupils, to collect all the principles and rules which govern the practice of every Court, at least in the United Kingdom; and the following pages relative to those of *general jurisdiction* are the result of that labour, rendered more difficult by the recent alterations in the Law, all of which are

incorporated, and which have caused even the admirable work of Sir William Blackstone (hitherto the *vade mecum* of Legislators and Private Gentlemen,) and many other excellent treatises, to be almost *obsolete* and in practice even *dangerous* to follow.

When examining in distinct sections separately the particulars of the jurisdiction of each of the *fourteen* principal Courts, whether exclusive or concurrent, it will be found that there are suggestions and full directions, not only when a particular remedy can be pursued *only* in one particular Court, but also when one of several Courts, having *concurrent* jurisdiction, is to be *preferred*, and *why*. The leading distinctions and peculiar advantages arising, under varying circumstances, from proceeding either at *Law* or in *Equity*, or in the *Ecclesiastical* or *Admiralty* Courts, or by adopting a *summary* in lieu of a *formal*, dilatory and expensive remedy, are constantly explained. A full examination into these is of the utmost importance, and constitutes what may be termed the science of Law, instead of the mere practice. (a) One or two instances of several thousand, hitherto but little known, may suffice to illustrate; thus, *contribution* amongst sureties *may* in general be enforced as well in Courts of Law as in Equity; but in some cases the remedy is more extensive in Equity than at Law; (b) and a *small legacy* may be recovered in an Ecclesiastical Court in a very short time, and comparatively free of expense, when it would be absurdly ruinous to attempt to proceed in a Court of Equity. (c) So if there has been a collision of ships at sea, and greater damage thereby occasioned to one than to the other, in consequence of

(a) *Post*, 302, 303, note (g).

(b) *Post*, 303, note (h).

(c) *Post*, 498, 499.

the bad management of *both* the ships, equally or at least both in a degree to blame, an action at law would in such case fail, (*d*) but in the Court of Admiralty an equitable contribution by the owner of the ship least damaged could be enforced. (*e*) So *several* sailors may, in the Court of Admiralty, *join* in a suit for their separate wages, although due on distinct contracts, and may in such suit arrest the ship to secure the payment, though at law each must have sued separately, and could not have such security. (*f*) These and innumerable other important distinctions, as well in jurisdiction as in practice, will be found collected in the following pages.

Sect. 1, Jurisdiction and practice of *all* the Courts.

Sect. 2, Jurisdiction and practice of the three Courts of *Law* and which preferable.

The *first* section gives an outline of the *jurisdiction* and *general course of practice in all* the Courts. The *second* examines the jurisdiction and practice of the *three Courts of Law* at Westminster, viz., the King's Bench, Common Pleas and Exchequer of Pleas, and shews that in general in these and most other Courts the remedy is either *formal* or *summary*, and states the original and present distinct provinces of each of these Courts, and concludes with an enumeration of the several principal circumstances, which may either in general or in particular cases induce a preference of one Court to another; such as, *first*, the general competency and ability of the Court to be preferred: *secondly*, the supposed opinion or inclination of its Judges on particular points of Law, or even ethics: *thirdly*, the distinction in practice of each Common Law Court, as one being more favourable to an Attorney's lien than the others: *fourthly*, the arrears of other suits and pro-

(*d*) *Vernal v. Gardner*, 3 Tyr. R. 85, *post*, 515.

(*e*) *Post*, 514.
(*f*) *Post*, 520.

bability of dispatch in one Court or delay in another : *fifthly*, the peculiar talent of particular Counsel acting in each Court, and the certainty of their attendance in the important stages of the cause. (*g*)

The *third* section is devoted to the full investigation of the distinct jurisdiction and practice of the Court of *King's Bench*. (*h*) First, *That over civil matters*, as first, in *formal actions*, whether personal, real or mixed: secondly, in *Summary* proceedings, as by Habeas Corpus, on Awards, Annuities, Mortgage Deeds, Bail and Replevin Bonds, or respecting Warrants of Attorney, Officers of the Court, Sheriffs and Bailiffs, Attornies and Articled Clerks, and Costs of Election Petitions: thirdly, in proceedings in furtherance of the Court's *own jurisdiction*, as at Common Law, in protection of Sheriffs, or under the Interpleader Act, and upon interrogatories and commissions for examining Witnesses; and of the inability of this Court to compel a discovery: fourthly, proceedings in aid of the Civil jurisdiction of *other Courts*, or in compelling them to act, or restraining them from acting, or on appeal from their decisions; and herein of the Court's delivering its opinion on cases from Courts of Equity, and trying Issues, and of enforcing judgments of Inferior Courts, and of Writs of Mandamus and Prohibition; and lastly, of the Court's jurisdiction as a Court of Error or Appeal from Inferior Courts or Tribunals, as well formal on Writs of Error and Certiorari, as summarily upon the decision of Justices, in cases between Landlord and Tenant, and in other cases. *Secondly*, its jurisdiction *over Criminal and Public matters*, as regards Indictments and Criminal Informations, Articles of the

Sect. 3, Jurisdiction and practice of the Court of King's Bench.

(*g*) *Post*, 320 to 324.

(*h*) *Post*, 324 to 382.

Peace, Informations in nature of Quo Warranto, and the Criminal Jurisdiction as a Court of Error and Appeal in Criminal cases, either formal upon a Writ of Error, or summary upon Certiorari, removing Convictions, Coroners' Inquests, and cases stated at Sessions relative to Poor Rates and other Assessments, and Orders of Removal, and proceedings before Commissioners of Sewers. The author anxiously hopes that this section, compressed in less than sixty pages, may be found useful to *Junior Barristers*, as containing an outline of all the subjects upon which their future practice in the Court of King's Bench will be founded.

Sect. 4, Court
of Common
Pleas.

The *fourth* section relates to the Court of *Common Pleas*, shewing its *coextensive jurisdiction* over all *Personal Actions*, and its *exclusive jurisdiction* over *Real Actions*, and in *quare impedit* at the suit of the subject, and over Fines and Recoveries. It is then concisely submitted, that in respect of the excellent Constitution of this Court, and the great learning of its Judges and of the Serjeants, a considerable part of its former *exclusive jurisdiction* ought to be restored, so as to establish a more perfect and uniform system of Law, at least as respects *Real property*, than at present exists. The jurisdiction of this Court is also practically considered as regards Habeas Corpus, Awards, Annuities, Mortgages, Attornies and Officers of this Court, and in Prohibition, &c. together with its jurisdiction as a Court of Appeal; but without having any direct cognizance of crimes.

Sect. 5, Court
of Exchequer of
Pleas.

The *fifth* section states the very various subjects of the jurisdiction of the Court of *Exchequer of Pleas*, originally constituted only for Revenue purposes, but now having jurisdiction concurrent with the King's

Bench and Common Pleas, over all *Personal* actions, but limited like the King's Bench as regards real and mixed actions. The cases in which this Court has *exclusive* jurisdiction are also enumerated, especially as regards proceedings on recognizances of a public nature, and for enforcing payment of fines imposed by other Courts, or the payment of Legacy Duties or Taxes, or duties of Customs or Excise, the jurisdiction and practice on Extents in Chief or in Aid, on informations on Seizures under the Laws of Customs and Excise; and the jurisdiction and practice on Petitions of Right, &c. between the King and the Subject, and the Crown practice in the Exchequer, although it has no direct criminal jurisdiction. Some of the subjects of this section, although of great practical importance, have not before been published; and hence the difficulties which Barristers and Solicitors practising in general in other Courts have frequently experienced.

The *sixth* section contains a practical inquiry into the particulars of the jurisdiction of the *Chancellor* and *Court of Chancery*; and, knowing by personal experience the usual defects in the information of Barristers and Attornies who generally practise in the *Common Law Courts*, and the consequent inconveniences, if not embarrassment, they have to surmount, I have endeavoured to assist in removing those difficulties. Of course the principal distinctions between *Legal* and *Equitable* rights, injuries and remedies are explained, and the *four* distinct subjects of the jurisdiction of the Chancellor have been stated; and as regards his principal *Equitable* jurisdiction in *Chancery*, the cases of Accident and Mistake, Accounts, Frauds, Interests of Infants, Specific Performance of Agreements, and cases of Trust are examined; and it is

Sect. 6, Of
Chancellor and
Court of Chan-
cery.

shewn when it is preferable to proceed in Chancery or when at Law. The course of proceeding, whether formal by Bill and Answer, Hearing and Decree; or more summarily by Motion, and the peculiar and admirable remedies by *Injunction* to prevent injuries, or by bill and decree of *Specific Performance* of contracts, enforcing the specific enjoyment of a right, are fully considered, and these within the space of *forty* pages.

Sect. 7 & 8,
Courts of Mas-
ter of the Rolls
and Vice-Chan-
cellor.

In the *seventh* and *eighth* sections, the distinct jurisdiction and practice before the *Master of the Rolls*; and also before the *Vice-Chancellor* in aid of the Chancellor, and as in effect branch jurisdictions subordinate to, though in some respects independent of that Tribunal, are practically stated.

Sect. 9, Equity
side of Exche-
quer.

The jurisdiction and practice on the *Equity side of the Court of Exchequer* form the subjects of inquiry in the *ninth* section; the particular advantage of filing an Injunction Bill in that Court, in preference to Chancery, is noticed.

Sect. 10, Of
Ecclesiastical
Courts.

Having in the earlier stages of my professional studies and practice experienced most disheartening difficulties from the want of adequate knowledge of the jurisdiction and course of proceedings in the *Ecclesiastical* and *Admiralty* Courts, I have analyzed and arranged the results of the modern Reports of decisions in those Courts. These affect very extensive and interesting branches of litigation, and afford redress or punishment for many either private or public injuries. The *private* suits may be arranged under *five* heads, as 1st, *Pecuniary causes*, for the recovery of Ecclesiastical

debts, duties or demands, as claims for Tithes, (*k*) Ecclesiastical dues and Ecclesiastical waste, called spoliation, being either wilful or permissive waste, as dilapidations in parsonage houses, &c. 2ndly, *Matrimonial causes*, and including suits either for jactitation, in other words malicious pretence of marriage; also, nullity of marriage on the ground that it was originally void, on various grounds; as incestuous, or having been between persons too nearly related, or obtained by force or fraud, or on account of pre-existing impotence, or marriage under wilfully false names, contrary to the Marriage Act; also suits for restitution of conjugal rights; suits for *divorces* on account of *adultery* or *cruelty*, or some infamous propensity; and collateral suits for *alimony*; (*l*) most of which causes are unhappily of very frequent occurrence, and the particulars of which necessarily interest many members of the community. 3rdly, *Testamentary causes*, relating either to the validity of wills, or the grant of letters of administration, (*m*) or to the distribution of assets by the payment of debts or legacies; (*n*) or distribution of a residue unappropriated by a will; and these include all that relates to *caveats* to prevent the grant of probate or of letters of administration, and applications and suits to obtain the same, or compelling sureties in an administration bond to justify, or swear that they are worth the penalty of the bond, and also comprise suits in the Ecclesiastical Courts for the recovery of a legacy, (and which in ordinary cases seem preferable to a suit in equity,) and also to obtaining per-

(*k*) *Post*, 456, 457; and see form of citation and libel, *post*, 490, 491, note (*x*).

(*l*) See fully, *post*, 458 to 464, 484, 487, 490, 498, note (*h*).

(*m*) *Post*, 464 to 468, 500 to 507, and forms in notes.

(*n*) As to legacies in particular, see the summary remedy, *post*, 466, 467, and particularly 498 to 500.

mission to proceed on the administration bond, &c. 4thly, are suits for *Spiritual Defamation*, or the *verbal* imputation of the guilt of some offence punishable only in an Ecclesiastical Court, and which, as now conducted and enforced, in protection of character, seems admirably constituted to punish a malicious slanderer, and afford some atonement to a defamed party, more effectually than the Common Law action for slander. (o) And 5thly, Suits for *disturbance of Pews or Seats in Churches*, or the right of *burial*. The *second* branch of Ecclesiastical jurisdiction relates to proceedings of a *Public nature*, as against Churchwardens for non-observance of their duty, and relating to Church Rates, and especially suits for subtraction of a sum duly assessed; (p) offences by Ministers, as refusing to marry, christen or bury; or offences for which they may be deprived or otherwise punished; and for other Ecclesiastical offences, as striking or brawling in a Church or Church Yard; adultery, fornication, lewdness, drunkenness and solicitation of chastity, each of which are cognizable in those Courts; the last exclusively so. The proceedings in these suits are stated, and the best approved *forms* applicable to the same are given in the notes.

Sect. 11, Court
of Admiralty.

As regards the Court of *Admiralty*, (the subject of the *eleventh* Section,) the proceedings are either for compensation for torts, or to enforce contracts express or implied. The former for a Sea Battery, (q) Collision of Ships, (r) tortious possession of Ships, (s) or the restitution of Goods taken piratically or illegally, and

(o) *Post*, 467 to 472, 486. note.
 (p) *Post*, 47 to 475, 491, 492. (r) *Post*, 513.
 (q) *Post*, 512, and see form of (s) *Post*, 510.
 warrant to arrest master, 535, in

not as Prize.(*t*) And in connection with contracts, are Suits between Part-owners of Ships, as to obtain security on a ship's being sent on a voyage without consent;(*u*) or for Mariner's Wages,(*x*) or for Pilotage,(*y*) or on Bottomry Bonds,(*z*) or relating to Salvage(*a*) or Wreck.(*b*) The distinctions between the jurisdiction of the Admiralty Court and the Prize Court are also enumerated. When it is considered that the reports alluded to are the decisions of such distinguished Judges as Lord Stowell, Sir John Nicholl, Sir Christopher Robinson, and Dr. Lushington, &c., it will be anticipated that they are of the highest value. Some *forms* of proceedings in this Court are stated in the notes as calculated to illustrate the context.

With the view of assuring myself that I have collected a correct account of the jurisdiction and present practice of the Ecclesiastical and Admiralty Courts, I have myself as it were become a student and pupil in those departments, and resorted to the various offices for information and for forms, and I have, with the liberal and able assistance of some of the eminent Practitioners in those Courts, been enabled to state their usual proceedings, at present too little known to Common Law and Equity Practitioners,(*c*) who consequently frequently adopt remedies in the Courts, where they practise, when they might have proceeded with much more advantage to their Clients in an Ecclesiastical Court, or in that of Admiralty. I have

Sources of information relative to the Ecclesiastical Courts and Admiralty Courts.

(*t*) *Post*, 517.

(*u*) *Id.*

(*x*) *Post*, 520; and see form of affidavit and warrant to arrest ship, and of libel for wages, &c. 533, note (*g*).

(*y*) *Post*, 526.

(*z*) *Id.*

(*a*) *Post*, 528.

(*b*) *Post*, 531.

(*c*) See in particular the observation of Dr. Haggard in *Cassel v. Roberts*, 3 Hagg. Ec. Ca. 161, note (*g*), and *post*, 499.

been assured by the most eminent Proctors, that very frequently they experience the greatest difficulties in endeavouring to avoid fatal mistakes in their proceedings, in consequence of attornies and solicitors, in other respects skilful, being utterly ignorant even of the most ordinary proceedings in the Ecclesiastical and Admiralty Courts, and they consider that a recurrence of such consequences may be avoided by the publication of a work, giving an outline of such proceedings; and I am induced to hope that a perusal of the Sections X. and XI., being from pages 454 to 540, will enable even *suitors* themselves to anticipate and avoid any future difficulty.

Sect. 12, The
Prize Court.

The *twelfth* section concisely states the jurisdiction of the *Prize Court* as distinguishable from the Admiralty.

Sect. 13, The
Courts of Bank-
ruptcy.

In the *thirteenth* section will be found a summary of the *present* practice in *Bankruptcy*, as altered by 1 & 2 W. 4, c. 56, and subsequent act and rules thereon, which created and regulate “*The Court of Bankruptcy*,” comprizing under that term the Court of each of the Six London Commissioners; the two Subdivision Courts, each before three of such Commissioners; and the *Court of Review*, with its four, or at present only three Judges, (having power to try disputed facts by a jury,) with an *appeal* to the *Chancellor*, and from him or sometimes direct from the Court of Review to the *House of Lords*. A practical analysis of these recent acts and rules, and a statement of the usual course of proceeding may not be unacceptable even to those who may not practise in either Court; and a creditor of a bankrupt will in this section find his course of proceeding, either to obtain a fiat or to prove a debt, fully described.

Every Practitioner has experienced considerable difficulty in stating or pursuing the practice in *Error* and upon *Appeals*, the former from *judgments* of Courts of *Law*, the latter usually from *decrees* and proceedings of a Court of *Equity*, or of an Equitable nature, and therefore the *fourteenth* section contains a compact examination of the jurisdiction of the Courts of Error and Appeal; first, of the Exchequer Chamber: secondly, of the Privy Council, and the Judicial Committee thereof: and, thirdly, of the House of Lords, whether on Writs of Error or Appeal from Courts of Law or Equity in England, Scotland or Ireland.

Sect. 14, The Courts of Error and Appeal.
1. Exchequer Chamber.
2. Judicial Committee of Privy Council.
3. House of Lords.

I repeat that I consider these subjects constitute what may be properly dignified with the appellation of “*The Science of Practice*,” important to be known to all Private Gentlemen as well as Lawyers, so as to enable them to secure *the best remedy* in almost every possible case that can arise. The rest of the Practice (to be considered in the concluding part) relates to the *Writ, Declaration, Pleadings* thereon, *Evidence, Brief, Trial, Judgment* and *Execution* at Law; and in *Equity*, to the Bill, Subpœna to answer, the Answer, Affidavits, Motions, Hearing, Decree, and Proceedings to enforce the same; and the full Practice in all the other Courts; which, though of considerable interest to every *professional* person concerned, are nevertheless of less real importance, at least to the community at large. That part, with a practical detail, and improved forms, will be published immediately the result of the bill for modifying the law of arrest has been ascertained.

J. CHITTY.

Chambers, 6, Chancery Lane,
10th October, 1834.

TABLE OF CONTENTS

OF

VOL. II. PART IV.

CHAPTER V.

JURISDICTIONS OF THE SUPERIOR COURTS OF LAW, EQUITY, ECCLESIASTICAL, ADMIRALTY, PRIZE, AND BANKRUPTCY, AND THE COURTS OF ERROR OR APPEAL, AND WHICH COURT IS PREFERABLE..... Pages 301 to 604.

	Page.
SECT. I. <i>Jurisdiction of Courts in general.</i> Division of, into those of Law, Equity, Ecclesiastical, Maritime, and Prize, or International, and those of Error or Appeal.....	301
Necessity for knowledge of particular jurisdiction of each Court and for a judicious choice by a plaintiff as well as a defendant	302
Distinction between Legal, Equitable, Ecclesiastical, Maritime, and International Rights, Injuries, and Remedies.....	304
Reasons for Division of Courts and appropriation of Particular Business to each	<i>ib.</i>
Attempts of each Court formerly to extend its jurisdiction....	307
Consequence of a Court not having jurisdiction wrongfully assuming it	<i>ib.</i>
Enumeration of Superior Courts in general	308
Courts of Law of original jurisdiction	<i>ib.</i>
Courts of Equity	<i>ib.</i>
Ecclesiastical or Spiritual Courts, &c.	<i>ib.</i>
Court of Admiralty.....	508
Court of Prize.....	538
Court of Bankruptcy	540
Courts of <i>Error</i> from judgment of Superior Courts of Law ..	<i>ib.</i>
The Court of Exchequer Chamber	308
The Privy Council and Judicial Committee thereof	309
The House of Lords	<i>ib.</i>
The principal distinctions between the Jurisdictions of all these Courts	310
SECT. II. <i>Jurisdiction and Practice of Courts of Law at Westminster in general</i>	311
Outline of jurisdiction of each Court.....	<i>ib.</i>
Outline of jurisdiction of each Court, whether formal or summary, or by way of appeal or error, or controlling Inferior Courts, and when summary proceedings can be sustained ..	312
The present co-extensive jurisdiction of all the Superior Courts of Law at Westminster, and exceptions.....	314
Exceptions as to Officers and Attornies, &c. of each particular Court	315
Revenue Officers	316
Officers of Courts of Equity	317
Where Debt or Damages are small	318
Alterations and extension of jurisdiction of Courts of Law by recent Acts	319
The several circumstances influencing the option to sue in a particular Court	320

	Page.
SECT. III. <i>Jurisdiction of Court of King's Bench in particular</i>	324
The jurisdiction and general practice of this Court	<i>ib.</i>
<i>First.</i> What jurisdiction over civil matters	325
1. <i>Formal actions.</i>	
Personal actions	<i>ib.</i>
Mixed actions	326
Not over real actions	<i>ib.</i>
2. <i>Summary proceedings; as over</i>	
Habeas Corpus	327
Awards	328
Annuities	329
Mortgage Deeds	331
Bail Bonds and Replevin Bonds	333
Warrants of Attorney	<i>ib.</i>
Officers of the Court, Sheriff's Bailiffs, &c.	337
Attornies and Articled Clerks	338
Imperative judgment by default in proceedings for costs of Election Petitions by 9 G. 4, c. 22	340
3. In furtherance of the Court's own jurisdiction and of the extension of jurisdiction of the Courts of Law	
By Interpleader Act 1 & 2 W. 4, c. 58, s. 6	341
Relief to Sheriffs	<i>ib.</i>
Relief at Law in other cases under the Interpleader Act 1 & 2 W. 4, c. 58	343
By extension of jurisdiction of the Superior Courts of Law by enabling them to issue commissions and to examine witnesses on interrogatories under 1 W. 4, c. 22	346
No compulsory discovery except in summary proceedings, and of the ineffectual attempt to establish such compulsory power now exclusively exercised by Courts of Equity	348
Summary application to prevent the abuse of the authority of the Court or other vexatious proceeding	349
4. Civil jurisdiction in aid of the civil jurisdiction of other Courts, or in <i>compelling them to act</i> , or <i>restraining</i> them from acting, or from acting improperly; and on appeal from their decision	350
Right of Courts of Equity to send a case to a Court of Law for opinion	<i>ib.</i>
Trial of issue in fact directed by a Court of Equity or by a Statute	352
In aid of Inferior Courts in enforcing their civil jurisdiction	353
General utility of the Writ of Certiorari returnable in King's Bench	<i>ib.</i>
Control over, by Mandamus	354
Suggestions for the extension of the remedies by Mandamus and prohibition	<i>ib.</i>
By <i>prohibition</i>	355
Prohibition to prevent injury	358
As a Court of Error and Appeal in civil cases, as formally by Writ of Error or false judgment	360
Summarily between Landlord and Tenant	361
In other cases	<i>ib.</i>
<i>Secondly.</i> Jurisdiction of King's Bench over cases of a criminal or public nature	362

	Page.
SECT. III. Jurisdiction of Court of King's Bench in particular—(continued.)	
By indictment	362
By criminal information	363
Alteration in the practice and of giving judgment immediately after trial in criminal cases	366
Articles of the Peace	367
Quo Warranto	<i>ib.</i>
Removal of Indictments and Presentments from Inferior Courts.....	368
Restrictions on Writs of Certiorari	
No Certiorari to be granted but upon motion of Counsel and upon a rule granted in open Court, and that before allowance of Certiorari a <i>recognizance</i> by two sureties shall be acknowledged before Justices	370
Conditioned return of certiorari to appear and plead to the indictment or presentment and at costs of prosecutor of certiorari to cause the issue joined to be tried at next assizes	<i>ib.</i>
Such recognizance to be certified and returned with certiorari and indictment to King's Bench	<i>ib.</i>
Otherwise the Court below may proceed to try the indictment	371
In case defendant be convicted, King's Bench to give costs to prosecutor if the party grieved or public officer, &c.....	<i>ib.</i>
And attachment issues for such costs.....	<i>ib.</i>
In vacation a Judge of King's Bench may grant a certiorari and the like recognizance required.	<i>ib.</i>
Certiorari in counties palatine of Chester, Lancaster or Durham.....	<i>ib.</i>
Certiorari to remove Indictment or Presentment for not repairing Highways, Bridges, &c. in case the obligation to repair should come in question.....	<i>ib.</i>
That the recognizance for certiorari may be before a judge of King's Bench in same sum as required by 5 W. & M. c. 11, but in addition to the terms of the recognizance the condition is to be for the party defending appearing in King's Bench from day to day in Court.....	<i>ib.</i>
Removal by <i>Writ of Error</i>	374
of Coroner's inquests &c.....	<i>ib.</i>
Of certiorari to remove Convictions, Orders, &c.	<i>ib.</i>
Quære if any remedy when certiorari taken away.	376
Regulations of certiorari to remove convictions and orders.....	<i>ib.</i>
No certiorari to be allowed to remove justices' order without a recognizance of £50 to prosecute to effect.....	<i>ib.</i>
On refusal of recognizance justices to proceed ..	<i>ib.</i>
Recognizances to be certified into the King's Bench	<i>ib.</i>
<i>Attachment</i> for contempt	377

	Page.
SECT. III. <i>Jurisdiction of Court of King's Bench in particular—(continued.)</i>	
Certiorari when and how to be applied for, viz. within six months and after six days' previous written notice	377
The practice	378
Removal of proceedings before Commissioners of Sewers	379
Jurisdiction upon Cases stated at Sessions for opinion of Court relative to Poor Rates, Set- tlements, and Orders of Removal, &c.	380
SECT. IV. <i>Jurisdiction of Court of Common Pleas in particular</i>	382
The constitution and jurisdiction of this Court.	ib.
In real actions	ib.
Over Fines and Recoveries.	383
Mixed actions	ib.
Exclusive privilege of the Serjeants abolished and the Court opened in Banc to all Baristers	385
Over Summary Proceedings	
Habeas Corpus.	386
Awards	387
Annuities	ib.
Mortgagees, Landlords and Tenants, Bail Bonds, Replevin Bonds, &c.	ib.
Attornies and Officers	ib.
Prohibition	388
Removal of proceedings from Inferior Courts	ib.
Has no jurisdiction over Crimes.	389
SECT. V. <i>Jurisdiction of Court of Exchequer of Pleas in particular</i>	389
The Exchequer and its several Revenue and Law Courts	ib.
The Exchequer of Pleas.	390
When the jurisdiction of the Exchequer is exclusive	392
Not in real or mixed Actions, excepting Ejectment	ib.
Feigned Issues	ib.
Summary jurisdiction	393
Habeas Corpus.	ib.
Warrants of Attorney	ib.
Jurisdiction over its Officers and Attornies practising there .	394
Practice in Outlawry	ib.
In Quo Warranto.	395
In Prohibition	396
Removal of Civil Suits from Inferior Courts.	ib.
Proceedings on Recognizances and for Fines, &c.	ib.
Newspaper Recognizances	398
Extents in chief or in aid.	ib.
Crown's recovery of legacy duties	399
Where executors &c. shall not have paid the duties on legacies under 36 G. 3, c. 52, s. 6, &c. the Court of Exchequer on application from the Stamp Office may grant a rule against such Executors to deliver in an account on oath of legacies paid &c.	ib. 400
In recovering Taxes	ib.
Relative to Custom Duties	401
Exclusive jurisdiction upon information on seizures.	ib.

	Page.
SECT. V. Jurisdiction of Court of Exchequer of Pleas &c. (continued.)	
Attorney-General may enter appearance in Exchequer when 4 & 5 W. 4, c. 51, s. 117	402
Petitions of right as between king and subject	
No jurisdiction over criminal matters excepting collaterally ..	403
<i>Jurisdiction of Courts of Equity in general.....</i>	<i>ib. to 454</i>
SECT. VI. Jurisdiction of the Chancellor and Court of Chancery in particular	405 to 443
1. The Court of Chancery and the Chancellor's jurisdiction is either original or by Statute	405
First, Common Law jurisdiction of Chancellor	406
Secondly, The Equitable jurisdiction in Chancery in cases of	
1. Accidents and mistakes	408
2. Accounts	410
3. Frauds and unjust assertions of legal rights	411
Injunctions to prevent or restrain actions or proceed- ings at Law	414
Bills for relief against forfeiture.....	417
Bills for an injunction to prevent setting up outstand- ing term or other legal defence	<i>ib.</i>
Bills of Interpleader.....	<i>ib.</i>
Bills for discovery	419
In aid of other Courts, as by commission to examine witnesses on Interrogatories	421
4. Infants	<i>ib.</i>
5. Specific performance of agreements and other specific relief	422
6. Trusts, Executors, and Legacies.....	423, 424
Thirdly, The statutory jurisdiction of the Chancellor and Chancery	425
Fourthly, The specially delegated jurisdiction.....	426
The principal peculiarities in the jurisdiction of Courts of Equity	<i>ib.</i>
Course of proceedings in Equity. Courts are formal or summary	429
Summary jurisdiction	
Over Annuity deeds.....	431
Over Arbitrations and Awards	<i>ib.</i>
Over Solicitors.....	432
When Court of Chancery has not jurisdiction or will not exer- cise it.....	433
Not to prevent crimes	<i>ib.</i>
When not over marriages.....	434
When not over alimony	435
When not over wills.....	<i>ib.</i>
Not if the remedy be at law, &c. unless Equity has a con- current and equal jurisdiction.....	436
When the remedy at Law or in Equity is concurrent which is preferable	437
Not when the claim is so small as to be <i>infra dignitatem</i> to afford relief	439
A summary of the equitable jurisdiction of Court of Chancery .	<i>ib.</i>
The Chancellor, how relieved from the pressure of some of these several branches of jurisdiction and the same delegated to other Courts or officers	441

	Page.
SECT. VI. <i>Jurisdiction of Chancellor, &c.—(continued.)</i>	
The jurisdiction and proceedings in all Courts of Equity in general the same	443
SECT. VII. <i>Jurisdiction of the Master of the Rolls in particular.</i>	
The Master of the Rolls and his Court and jurisdiction	ib.
The jurisdiction of the Master of the Rolls settled by 3 G. 2, c. 30	444
The Court and jurisdiction of the Master of the Rolls.....	ib.
SECT. VIII. <i>Jurisdiction of the Vice-Chancellor in particular.</i>	
Of the Vice-Chancellor and his Court and jurisdiction	446
SECT. IX. <i>Jurisdiction of the Equity side of the Exchequer in particular</i>	450
The Equity side of the Court of Exchequer	ib.
Advantages of filing a Bill for an Injunction in this Court of Exchequer in preference to Chancery	452
Suits for Tithes	ib.
Writs <i>Ne exeat Regno</i> from this Court	453
The Equity side of the Exchequer has exclusive equitable ju- risdiction in cases relative to Crown property and Super- stitious uses	ib.
SECT. X. <i>The Jurisdiction and General Practice of the Ecclesiastical Courts</i>	454 to 508
1. Of the subjects of Ecclesiastical jurisdiction in general	455
<i>First</i> , Jurisdiction over <i>private</i> injuries	ib.
Jurisdiction principally depends on locality of the de- fendant within the district	456
1. Causes pecuniary	ib.
For Tithe	ib.
Proceedings in a suit for	490, 491
For Ecclesiastical dues, &c.	457
Spoliation, or Ecclesiastical waste	ib.
2. Matrimonial causes.....	458
Suits for jactitation.....	459
Suits for nullity of Marriage.....	ib.
Proceedings in such suit.....	488, 489
Suits for restitution of Conjugal rights.....	460
Proceedings in such suit	487
Suits for Divorce for Cruelty or Adultery ..	461
Proceedings in such suit	489
Suits for Alimony, and Costs pending suits for Divorce	462
3. Testamentary causes	464, 496 to 507
Legacies	466, 498 to 500
As to obtaining Probate, Letters of Adminis- tration, &c.	500 to 507
4. Defamation	467, 486, 487
Citation and Libel for	486, 487
5. Perturbation or Disturbance of Pews or Seats or Burial	472
<i>Secondly</i> , Jurisdiction over certain <i>public</i> matters, and over certain offences	ib.
Relative to Church Rates	ib.
Proceedings in such suit	491
Grammar Schools	475

	Page.
SECT. X. <i>The Jurisdiction and General Practice of the Ecclesiastical Courts—(continued.)</i>	
Ecclesiastical Officers, as Churchwardens, Ministers, &c.	475
Ecclesiastical offences	<i>ib.</i>
Brawling, &c.	476
Limitation of Suits in Ecclesiastical Courts	478
Circumstances rendering it expedient to prefer a proceeding in the Ecclesiastical Court	<i>ib.</i>
When the Ecclesiastical Courts <i>have not jurisdiction</i> , either as respects the original suit or some matter afterwards arising	479
Course of proceeding in the Ecclesiastical Courts in general	481
Plenary causes	<i>ib.</i>
Parties in	482
Process	<i>ib.</i>
Libel	<i>ib.</i>
Answer	<i>ib.</i>
Witnesses	483
Sentence	<i>ib.</i>
The practical proceedings in certain suits of usual occurrence	485
Proceedings in a suit for Defamatory words....	486
Form of citation in a suit for Defamation,	<i>ib.</i>
Form of libel in the Consistory Court for the same	487
Proceedings in a suit for Restitution of Conjugal Rights	<i>ib.</i>
Proceedings in a suit for Nullity of Marriage by reason of undue publication of banns	488
Proceedings in a suit for Nullity of Marriage by reason of incest.....	489
Proceedings in a suit for a Divorce by reason of cruelty for adultery.....	<i>ib.</i>
Proceedings in a suit for subtraction of Tithes..	490
Appeal therein from Diocesan to Arches Court .	<i>ib.</i>
Proceedings in a suit for subtraction of Church Rate	491
Form of citation in a suit for subtraction of Tithes, at instance of Rector, in Consistorial Court of Exeter	<i>ib.</i>
Form of libel in a suit for subtraction of Tithe, in Consistorial Court, Exeter	<i>ib.</i>
Of the right of <i>Intervention</i> by a third party in an Ecclesiastical suit.....	492
Of the several Ecclesiastical Courts in general..	494
1. Archdeacon's Court	495
2. Consistory Court, or Diocesan of each Bishop	<i>ib.</i>
3. The Court of Peculiars	<i>ib.</i>
4. Arches Court	496
Jurisdiction of Court of Arches under Letters of Request	497
Jurisdiction of Arches as a Court of Appeal	498

	Page.
SECT. X. <i>The Jurisdiction and General Practice of the Ecclesiastical Courts—(continued.)</i>	
Mode of recovering a legacy in Court of Arches and Diocesan Courts	498
Form of Letters of Request for instituting a Divorce suit in Arches Court instead of Diocesan Court	<i>ib.</i>
5. Prerogative Court	500
Proceedings to obtain Prerogative Probate, or Letters of Administration	<i>ib.</i>
Form of Probate granted by Prerogative Court to a sole Executrix	501
Form of Letters of Administration granted by the Prerogative Court to the widow of intestate .	<i>ib.</i>
Proceedings to enter a caveat, so as to prevent grant of Probate or of Letters of Administration	502
Of obtaining an Inventory or Declaration in lieu	<i>ib.</i>
Of the Administration Bond	<i>ib.</i>
Of requiring the sureties in such bond to justify	<i>ib.</i>
Form of Caveat	<i>ib.</i>
Of proceeding on the Caveat, and contesting the validity of a Will .	503
Form of Affidavit of sureties justifying	<i>ib.</i>
A few points relating to suits and proceedings connected with Probate and Letters of Administration, &c.	504
Application for assignment of Administration Bond, and action thereon	505
6. The Court of Faculties	507
SECT. XI. <i>Jurisdiction of the Court of Admiralty</i>	508
In general	510
Appeal now to the Judicial Committee of the Privy Council ..	512
First, Jurisdiction in cases of <i>torts</i>	<i>ib.</i>
1. Suits for a Sea Battery	<i>ib.</i>
2. Suits for Collision of Ships	513
3. In a suit for Possession of a ship	516
4. In a suit for the restitution of goods piratically or illegally taken on the high seas, not as prize in lawful war .	517
Secondly, Jurisdiction in cases of contract	<i>ib.</i>
1. Between part-owners of a ship	<i>ib.</i>
2. Suits for Mariners' Wages	520
Summary power of a Justice of the Peace to decide upon a claim of wages not exceeding £20, under 59 G. 3, c. 58	526

	Page.
SECT. XI. <i>Jurisdiction of the Court of Admiralty—(continued.)</i>	
3. Suits for Pilotage	526
4. Bottomry Bonds	<i>ib.</i>
5. Suits and proceedings for Salvage	528
6. Wreck	531
When the Court of Admiralty <i>has not</i> jurisdiction	532
Not for mortgagee of a ship, or a person claiming title	<i>ib.</i>
Course of proceedings in the Admiralty Court	533
1. Form of Affidavit to lead or found a Warrant of Arrest ..	<i>ib.</i>
2. Warrant thereupon to arrest the ship for the arrears of <i>Wages</i>	<i>ib.</i>
3. Summary petition or libel for wages	534
No. 1. Certificate of due service of the mariner refer- red to in the libel, and to be annexed	<i>ib.</i>
No. 2. Another like certificate	<i>ib.</i>
4. Allegation on behalf of an owner, in a cause of subtrac- tion of wages, shewing mutinous or bad behaviour of complainant, amounting to desertion	535
5. Allegation on behalf of an owner in a cause of subtrac- tion of wages	<i>ib.</i>
6. Warrant to arrest ship for <i>Salvage</i>	<i>ib.</i>
7. Warrant to arrest master of a ship for a <i>Sea Battery</i> ..	<i>ib.</i>
SECT. XII. <i>Jurisdiction of the Prize Court</i>	538
SECT. XIII. <i>Jurisdiction of the Court of Bankruptcy and its subdivi- sions, as each Commissioners Court, and the two Subdivision Courts, Court of Review, and Appeals to the Lord Chancellor or to House of Lords</i>	540
General observations	<i>ib.</i>
The substance of the former Bankrupt Law continues, and only the practice has been materially altered, and that only as re- gards the Court and Officers	<i>ib.</i>
Formal commission annulled	541
Outline of former jurisdiction, and practice of the present ameliorated jurisdiction	<i>ib.</i>
The issuing of a London fiat	<i>ib.</i>
The issuing of a country fiat	542
An analysis of 1 & 2 W. 4, c. 56, altering the jurisdiction and powers of the Court of Bankruptcy and its subdivisions....	<i>ib.</i>
Sect. 1. The four Judges of the Court of Review	<i>ib.</i>
The six Commissioners	<i>ib.</i>
Constituted a Court of Law, and of Equity, and Record	543
2. The Court of Review the same jurisdiction as the Chancellor previously had on petition	<i>ib.</i>
3. Course of proceeding in Court of Review to be on petition, motion, or special case	<i>ib.</i>
Decision of Court of Review to be final, ex- cept on appeal by special case, to be heard and determined by Chancellor only	<i>ib.</i>
4. Court of Review may direct <i>an issue</i> in fact to be tried before one of its own Judges, or by a Judge on circuit	544
5. Costs in discretion of Court	<i>ib.</i>
6. The six Commissioners to form two Sub-division Courts of three Commissioners each	<i>ib.</i>

	Page.
SECT. XIII. <i>Jurisdiction of the Court of Bankruptcy, &c.—(continued.)</i>	
7. Any one Commissioner may execute powers of act, except that one can commit for safe custody only	544
8, 9. Official oaths of Judges, &c.; appointment of Registrars	<i>ib.</i>
10. Attornies and Solicitors may be admitted, and how far practise	<i>ib.</i>
11. Power of Court of Review to make general rules and orders	545
12. The Chancellor, Master of the Rolls, Vice-Chancellor, &c. when and how to issue his fiat in Bankruptcy	<i>ib.</i>
13. One Commissioner to act thereon when appointed by ballot on a town fiat, and how to be balloted for	546
15, 16. Commissioner's oath, and proceedings to adjudge the party a Bankrupt	<i>ib.</i>
17, 18. Proceedings when Bankrupt disputes his bankruptcy or adjudication	547
22. Appointment of Official Assignees, in whom property vested	<i>ib.</i>
Official Assignee, how balloted for by rotation on a town fiat	548
25, 26, 27. Necessity for instruments of assignment or conveyance to Assignees abrogated	548
34. Proof of debts by affidavit, and proceedings thereon if disputed, and trial by jury	<i>ib.</i>
Trial by jury of existence of a debt	549
31, 32. In what cases the decision of Commissioners or Sub-division Court may be appealed from to the Court of Review, and from thence to the Chancellor	<i>ib.</i>
37. Appeal to the House of Lords, when and how it might be prosecuted	550
Summary of other enactments in 1 & 2 W. 4. c. 56.	<i>ib.</i>
Substance of the statute 2 & 3 W. 4, c. 114, relating to Bankrupts	551
The Rules and Orders founded on 1 & 2 W. 4, c. 56, s. 11	<i>ib.</i>
The General Rules and Orders, 12 January, 1832	<i>ib.</i>
General Orders, 2d and 3d February, 1832	554
General observations on mode of obtaining a <i>fiat</i> or <i>proving</i> a debt, &c.	355
The proceedings to obtain and prosecute a <i>fiat</i>	556
Form of petitioning creditor's <i>affidavit</i> on which to <i>petition</i> for a <i>fiat</i>	<i>ib.</i>
Form of <i>affidavit</i> to obtain a country fiat	<i>ib.</i>
Form of petitioning creditor's <i>bond</i>	<i>ib.</i>
The like in a country fiat	557
Form of <i>petition</i> for a fiat	558
The like for a country fiat, and proceedings thereon	<i>b.</i>
Form of a <i>fiat</i> in a town bankruptcy	<i>ib.</i>
The like, more concise	<i>b.</i>
The like, for a country bankruptcy, and proceedings	558
The like, more concise	<i>ib.</i>

	Page.
SECT. XIII. <i>Jurisdiction of the Court of Bankruptcy, &c.—(continued.)</i>	
Decisions as to a <i>concerted fiat</i> or <i>act of bankruptcy</i> and of a <i>substituted</i> petitioning creditor's debt, and consequences of defective description in fiat, &c.	559
Proceedings after obtaining a fiat	560
Private meeting to open fiat and proceed to adjudication, &c.	561
Preamble to the proceedings at first meeting	<i>ib.</i>
<i>Memorandum</i> of a Commissioner on a country bankruptcy having qualified himself to act by taking the oath pursuant to the statute.....	562
Form of <i>oath</i> to be administered by the Commissioners to the witnesses, upon their examination under a town or country fiat.....	<i>ib.</i>
The <i>deposition</i> of petitioning creditors to the trading and act of bankruptcy	<i>ib.</i>
The form of <i>Adjudication</i>	<i>ib.</i>
<i>Warrant of Seizure</i>	<i>ib.</i>
Appointment of the <i>two public meetings</i>	563
Appointment of the <i>Official Assignee, &c.</i>	<i>ib.</i>
<i>Advertisement</i> in Gazette	<i>ib.</i>
<i>Memorandum</i> of bankrupt having surrendered, and consequences	564
<i>Proof</i> of debts	<i>ib.</i>
<i>Choice</i> of the creditors' Assignees	565
Form of proof of a debt for goods sold by a creditor in person	<i>ib.</i>
Form of <i>affidavit</i> on which to prove a debt	<i>ib.</i>
<i>Memorandum</i> of the choice of Assignees	566
Second public sitting, and subsequent proceedings ..	<i>ib.</i>
Dividends	<i>ib.</i>
Certificate	<i>ib.</i>
 SECT. XIV. <i>Of Courts of Error and of Appeal from the decisions of the preceding and other Courts</i>	 567
Of these in general	<i>ib.</i> 568
1. The Court of Exchequer Chamber	568
2. The Judicial Committee of Privy Council.....	573
The Courts from whose proceeding an appeal may lie..	576
From what interlocutory or final order or sentence an appeal may lie	577
What other matters may be referred to Judicial Committee	578
The prescribed time of appealing	<i>ib.</i>
Modes of convening witnesses and production of documents, &c.....	579
The modes of examining witnesses, &c.....	<i>ib.</i>
The re-examination of witnesses	<i>ib.</i>
Power to direct a feigned issue	<i>ib.</i> 580
Trial of such feigned issue	580
Regulations respecting costs	<i>ib.</i>
Decrees to be enrolled and copies taken.....	581
Decrees on appeals from abroad to be enforced as his Majesty in Council shall on recommendation of Judicial Committee direct	<i>ib.</i>

	Page.
SECT. XIV. <i>Of Courts of Error and of Appeal from the decisions of the preceding and other Courts—(continued.)</i>	
Existing powers of Chancery or King's Bench or Ecclesiastical Courts in punishing contempts and compelling appearances and enforcing judgments, decrees, and orders transferred and extended to Judicial Committee and to Privy Council	582
Power of the King to appoint a Registrar.....	<i>ib.</i>
Regulates the right of the Registrar of Court of Admiralty to attend	<i>ib.</i>
Regulations in treaties preserved	<i>ib.</i>
Orders in Council 9 Dec. 1833	<i>ib.</i>
Order in Council 10 Dec. 1833	583
Other matters relating to the Privy Council and the Judicial Committee	<i>ib.</i>
The course of proceedings in the Judicial Committee of the Privy Council.....	584
3. The House of Lords	585
1. General observations on the jurisdiction of the House of Lords and especially its appellate jurisdiction	<i>ib.</i>
2. From what Courts and proceedings and in what order the House of Lords exercises an appellate jurisdiction in general	589
1. From what Courts and proceedings in England.....	590
Courts of Law, and proceedings at.....	<i>ib.</i>
From Courts of Equity	593
2. From Courts in Scotland.....	595
3. From Courts in Ireland	<i>ib.</i>
4. In other cases	596
Course of proceedings on a Writ of Error in civil cases	597
The Practice.....	600 to 603



PART IV. VOL. II.*

CHAPTER V.

OF THE JURISDICTIONS OF THE SUPERIOR COURTS OF LAW,
EQUITY, ECCLESIASTICAL, ADMIRALTY, PRIZE, BANKRUPTCY,
AND COURTS OF ERROR OR APPEAL; AND WHICH COURT IS
PREFERABLE.

SECT. I. <i>The Jurisdiction of the Superior Courts in general</i>	301	Jurisdiction of Courts of Law by recent Acts	319
Division of the Courts, and Utility thereof	ib.	By what circumstance the Choice of the Court may be influenced	320
Ancient Attempts of each Court to extend its own Jurisdiction, and how controlled	307	SECT. III. <i>Particular Jurisdiction and general Practice of the Court of King's Bench (a)</i>	324
Consequences of improperly assuming Jurisdiction	ib.	IV. <i>Of the Court of Common Pleas (b)</i>	
Enumeration of all the superior Courts of Law, Equity, Ecclesiastical, Maritime, Prize, and Error or Appeal	308	V. <i>Of the Court of Exchequer</i>	
Principal Distinctions between the Jurisdiction of these several Courts	310	VI. <i>Of the Court of Chancery and Chancellor</i>	
II. <i>The Jurisdiction and Practice of the Courts of Law at Westminster in general</i>	311	VII. <i>Of the Master of the Rolls</i>	
Concise View of the present Jurisdiction	312	VIII. <i>Of the Vice-Chancellor</i>	
Is either <i>Formal</i> or <i>Summary</i> , or in Aid of or controlling inferior Courts	ib.	IX. <i>Of the Equity Side of the Exchequer</i>	
Co-extensive Jurisdiction of each Court, and Exceptions	314	X. <i>Of the Ecclesiastical Courts</i>	
Alterations and Extension of		XI. <i>Of the Court of Admiralty</i>	
		XII. <i>Of the Prize Court</i>	
		XIII. <i>Of the Courts of Bankruptcy</i>	
		XIV. <i>Courts of Error and Appeal</i>	
		1. Court of Exchequer Chamber	
		2. The Judicial Committee of Privy Council	
		3. The Judicial Court of the House of Lords	

SECT. I.—*The Jurisdiction of the Superior Courts in general.*

IN the preceding parts of this work, after giving an outline of private rights, injuries and remedies in general, we examined the modes of *preventing* or *removing* injuries by acts of parties *themselves* or of *third persons*, and by *summary* proceedings, as by habeas corpus, or by bill and motion for an injunction, or by mandamus or bill for specific performance. We have also taken a concise view of all the proceedings respecting the re-

SECT. I.
Of the jurisdiction of Courts in general. The division of the Superior Courts into those of Law, Equity, Ecclesiastical, Maritime, Prize or International, and Courts of Appeal and Error.

* N.B. This Fourth Part being in continuation of the Third Part, may ultimately be bound with the same, so as to form the Second Volume.

(a) At the head of this and each subsequent section, there will be printed an

analysis of its particular contents.

(b) As it would be inconvenient to wait till the sheets relating to the Court of Common Pleas and subsequent Courts have been printed, in order to insert the pages, they are here omitted.

CHAP. V.
SECT. I.

tainer of an attorney and his duties, and the steps to be taken before the commencement of an action; (a) and of the remedies by *arbitration*, (b) and by *summary proceeding before justices of the peace*. (c) We have now principally to consider *redress by proceedings in one of the Superior Courts*, whether of *Law*, or *Equity*, or Ecclesiastical, or Admiralty, or of Prize, or in a Court of Bankruptcy, and appeals and writs of error from each of those Courts; and it will be found that no question is of greater importance than—in *what Court should an action or proceeding be instituted, or in what Court must the defence be established?* (d)

Necessity for a knowledge of the particular jurisdiction of each Court, and a judicious choice, by a plaintiff as well as a defendant.

Every lawyer should be able promptly to answer, “The proceeding *must* be in the Court of —;” or, “you have the *option* of proceeding in the Court of — or of —, but under the circumstances of your case the Court of — will be preferable,” stating the several grounds or reasons for the preference. In some cases only one Court can be resorted to, and then an error would be fatal, and the debt or remedy might by delay be entirely lost. (e) In others, although the remedy might be pursued in either of the Courts, yet in respect of some particular circumstance a due election may be exceedingly important. In many cases, although a Court of Law, or Equity, or an Ecclesiastical Court, may have *concurrent* jurisdiction, yet it will be found that a judicious choice will frequently materially influence success. Thus a married woman having a separate estate, and executing a bond or signing a bill of exchange as a security, can, during the life of her husband, only be sued by bill in a Court of *Equity* in respect of such separate property; and payment could there only be enforced out of a reasonable *proportion* of the rents and profits, and not against her person, or by *elegit*, or by sale of the estate. (f) But if after the death of her husband she promised to pay the equitable debt, in consideration of forbearance for time elapsed, then it may be preferable to proceed against her by arrest and action in a Court of Law upon such promise, in which case, after judgment, an execution might be issued against her person, or

(a) *Ante*, 46 to 72.

(b) *Ante*, 73 to 127.

(c) *Ante*, 127 to 251.

(d) There are some questions relative to the conduct of a suit of *peculiar importance*, whilst others, comparatively, are of little consequence, or at least an error or irregularity relative to them may be remedied with less serious consequence. Of the former description are the *Court* to be proceeded in, the substantial allega-

tions in the *declaration* and *subsequent pleadings* not corresponding with the facts as proved, the *evidence*, and the *brief*, and *conduct* on the trial. The others principally relate to the writ and mere *practical* proceeding, the conduct of which may in general be left to an experienced and intelligent clerk.

(e) *Ante*, vol. i. preface, p. viii. note (a); and *post*, 303, note (g).

(f) *Nantes v. Corroch*, 9 Ves. 189.

her personal or real property.(g) So if there have been three sureties in a bond for £3000, and one of them has been obliged to pay the whole debt, he could *at law* only sue one of the sureties for his *third*, viz. £1000, although the other surety had become bankrupt; but in *equity* he might compel the surety remaining solvent to contribute £1500, the *moiety* of the entire sum.(h) So as regards *defences*, which, though not available at *law*, might be perfect or preferable in *equity*, of which there are many, if the party be wrongfully sued at law he must in the first instance file his bill in equity for an injunction or other relief, instead of defending at law, excepting for time and to prevent execution; for if he should delay doing so, and suffer the action to proceed to judgment, that Court would afterwards refuse to stay the proceedings on the judgment, to enable the defendant to file a bill in equity, even on strong affidavits shewing that he had inadvertently mistaken his course in defending the action at law, and was now advised that he had a good defence on the merits in a Court of Equity; so that from the omission to advance the defence in a proper Court, and in due time, a party may be subjected to a liability which he might have avoided.(i) These few of many thousand instances sufficiently shew that the judicious choice of one of several even concurrent jurisdictions may substantially vary the result. It is therefore obvious that no subject is of greater im-

(g) *Littlefield v. Shae*, 2 B. & Adol. 811; *Lee v. Muggeridge*, 5 Taunt. 36; and *ante*, vol. i. 2d ed. preface, p. viii. note (a), where we have shewn the fatal consequence of an error in proceeding injudiciously. "Recently a common law barrister, very eminent for his legal attainments, sound opinions and great practice, advised that there was no remedy whatever against a married woman, who, having a considerable separate estate, had joined with her husband in a promissory note for £2500, for a debt of her husband, because he was of opinion that the contract of a married woman is absolutely void, and referred to a decision to that effect, viz. *Marshall v. Rutton*, 8 T. R. 545, he not knowing, or forgetting, that in *equity*, under such circumstances, payment might have been enforced out of the separate estate. (*Bullpen v. Clarke*, 17 Ves. jun. 366; *Hulme v. Tenant*, 1 Bro. P. C. 16; *Stewart v. Lord Kirkwall*, 3 Madd. R. 387; *Bingham v. Jones*, at Rolls, 1832; Chitty on Bills, 8th ed. 791; *Field v. Soule*, 4 Russ. R. 112.) And afterwards, a very eminent equity counsel, equally erroneously advised, in the same case, that the remedy was *only in equity*, although it appeared upon the face of the case, as then

stated, that, after the death of her husband, the wife had *promised* to pay, in consideration of forbearance, and upon which promise she might have been *arrested and sued at law*. (*Lee v. Muggeridge*, 5 Taunt. R. 36; and *Littlefield v. Shae*, 2 B. & Adolp. 811.) If the common law counsel had properly advised proceedings in equity, or if the equity counsel had advised proceedings by arrest *at law*, upon the promise, after the death of the husband, the whole debt would have been paid. But, upon this latter opinion, a bill in Chancery was filed, and so much time elapsed before decree, that a great part of the property was dissipated, and the wife escaped, with the residue, into France, and the creditor thus wholly *lost his debt*, which would have been recovered, if the proper proceedings had been adopted in the first or even second instance. This is one of the *very numerous* cases almost daily occurring, illustrative of the consequences of the want of, at least, a *general knowledge of every branch of law*."

(h) *Brown v. Lee*, 6 Barn. & Cres. 689, rule at law; *Peter v. Rich*, 1 Cha. Ca. 34, rule in equity.

(i) *Rex v. Peto*, 1 Young & Jerv. 169; but Hullock, Baron, dissentiente.

CHAP. V.
SECT. I.

Distinctions between legal, equitable, ecclesiastical, maritime and international rights, injuries and remedies.

Reasons for the division of Courts, and appropriation of particular business to each.

portance than an intimate knowledge of the precise jurisdiction and practice of all the different Courts, and an *habitual inquiry* which is the best in reference to varying transactions is strongly recommended, as well to students as practitioners.

To determine upon the Court to be preferred, it is always necessary, upon the behalf of plaintiff, to ascertain the precise nature of the *right*, the *injury* and the *remedy*; and to protect a defendant, well to examine the nature of the defence, and whether it should be made at law or in equity. We have seen that Rights are Public or Private; that the latter relate either to the Person, or Personal or Real Property, and are either *Legal* or *Equitable*, *Ecclesiastical* or *Maritime*, *Municipal* or *International*; and that civil or private remedies are for the most part actions at law in the Temporal Courts, or suits in Equity, or proceedings in the Ecclesiastical Courts; further, that actions at *law* are *personal*, *real* or *mixed*, the former merely relating to *damages*, or the recovery of the person or *personal* property; the *second* for the recovery of land or other real property specifically; and the *third* partly for the recovery of *real* property, and partly for *damages* respecting it, as the action of ejectment, or *quare impedit*. *Injuries* also follow a similar arrangement, and are either public or private, criminal or civil, and affect a legal, or an equitable, or an ecclesiastical, or a maritime right, or a municipal or international question.

It will be observed that in the original formation of all independent states, redress for every kind of crime or injury has in general been at first afforded in *one General Court*, and without much regard to precise form; but as population and the intricacy of transactions increased, it was found that by a *division* into *several* different Courts, and appropriating particular descriptions of business to each, the judges and practitioners having more time to attend to their particular departments, necessarily became better acquainted with them, and not only decided more correctly upon the substantial questions, but also framed more appropriate rules and forms of proceedings, and in the result more efficiently administered justice according to the varying nature of each case.^(k) Hence we trace, and historically know, that in *England* there was a judicious and natural division into *Criminal* and *Civil* Courts, viz. the *Criminal Courts* of Oyer and Terminer and Gaol Delivery, and Sessions of the Peace; and various other Courts having general or local jurisdiction over *crimes*, *misdemeanors*

(k) Brac. Ab. 3, c. 7; Mad. Hist. Charta, as to the ancient *Wittenagemote*, or Exchequer; Spel. Glos. 35, 334; Gilb. General Council, or *Aula Regis*, as a general Court, and 2 Anstr. 624. C. P. 17; stat. 9 Hen. 3, c. 11, Magna

or *offences*; and the *Civil* Courts, either superior or inferior, having general or local jurisdiction over *civil matters*; as the Courts of King's Bench, Common Pleas, and Exchequer, for the decision of most civil *legal* claims; and the Courts of *Equity* (branching into the Court of Chancery, the Court of the Master of the Rolls, of the Vice-Chancellor, and the Court on the Equity side of the Exchequer), for the decision of all *equitable* claims; and the *Ecclesiastical* Courts for the decision of *spiritual offences* and *ecclesiastical rights*, and questions on the validity of *Wills* of personalty and *Matrimonial* causes, and suits for certain defamatory words attributing fornication, or other mere spiritual offence: the *Admiralty Court* for the decision of *maritime questions*; and the *Prize Court* for suits relative to captures, &c.; and numerous other inferior Courts, either *general* or *local*; and peculiar Courts of *Appeal* or *Error* from each. It will be found that in the original division of the principal Courts, it was intended that the Common Pleas should determine *all civil* causes between *private* subjects, and be what Sir Edward Coke termed the lock and key of the common law; (l) that the Exchequer should receive and enforce the *king's revenue*; and that the Court of King's Bench should retain all the jurisdiction which was not allotted to the other Courts, and particularly the superintendence over all inferior Courts, by way of appeal, prohibition and mandamus, and should have the *sole cognizance* of pleas of the crown in *criminal matters* arising in the county and during the time when such Court was holden.(m) But in many instances a degree of *concurrent jurisdiction*, especially upon collateral matters, was allowed to several Courts; for otherwise it would frequently occur that a proceeding peculiarly or mainly proper only in one Court, might be impeded by its inability to examine into some minor point, as in the case of a lost deed, where Courts of Law and Equity have concurrent jurisdiction.(n)

It will be found that in many cases the Courts have acted upon the principle that it is better that the original division of jurisdiction should be adhered to; (o) but nevertheless, modern enactments in numerous cases give equal jurisdiction to all the Courts of Law; though more properly, as regards private actions, the jurisdiction should have been vested in the Court of Common Pleas exclusively.

(l) 4 Inst. 99; Bac. Ab. Court of Common Pleas.

(m) See particularly Bac. Ab. Courts; Gilb. Hist. C. P. 2, 3.

(n) *Ante*, vol. i. 711. And see other cases of *concurrent jurisdiction* of Courts of Law and Equity, *Kemp v. Prior*, 7 Ves.

249, *post*; and Courts of Equity and Ecclesiastical Courts, *ante*, 112; and *post*; Ecclesiastical Courts.

(o) *Wells v. Pickman*, 7 T. R. 117; *Grignon v. Grignon*, 1 Hag. Ec. R. 545; 1 Anstr. 7.

CHAP. V.
SECT. I.

Each of these Courts adopted from the civil law, or framed de novo, a particular description of proceeding and practice, supposed to be best adapted to enforce its particular jurisdiction; (*p*) but in all it will be found that they adopted *two courses of proceeding*, the one *formal*, and the other *summary*. In the *Courts of Law* the *formal* proceeding was by writ, declaration, plea, replication and demurrer upon matter of *law*, formal argument, thereon, and judgment on demurrer; or an issue upon a matter or several matters of *fact*, the constitutional trial of which must be by *jury*, verdict for *damages*, and judgment for such damages and costs, afterwards enforced by formal writ of execution, either against the person or personal property, or by *elegit* against the personalty and land; and the *summary*, by affidavit, motion, rule nisi, affidavits in answer, arguments on both sides, and rule absolute or discharged; and if absolute, demand of performance, and such performance enforced by attachment for the contempt in not obeying the rule of the Court.—In *Courts of Equity* the *formal* proceeding was by bill filed, subpoena, and other process to enforce appearance; appearance, answer, depositions, hearing, formal decree; frequently for specific performance and costs, but not for damages, and enforced by attachment against the person, and by imprisonment; but not by any execution against the personal or real property of the defendant; though in a formal suit for the recovery of an equitable interest in land it is in general enforced by writ of assistance, and delivery of possession. The *summary* proceeding in Equity is by affidavit, petition or motion, contrary affidavits, hearing, and order for something to be done, and enforced by attachment.—In *Ecclesiastical Courts* the *formal* (there termed *plenary* suits) are by citation, libel, deposition, hearing, and decree usually with costs, and the performance of some specific act, as restitution of conjugal rights, public declaration of the innocence of the party defamed and prayer of forgiveness, and payment of costs, but not for damages; and enforced, not as heretofore, merely by excommunication, but by *significavit* and writ de contumace capiendo, and imprisonment, in effect perpetual, until obedience, under stat. 53 Geo. 3, c. 127: and the *summary proceeding*, as to obtain probate, or letters of administration, or payment of a legacy, is by petition, affidavit and summary motion, hearing and order, without any formal libel.—All these, and the pro-

(*p*) It is established that each Court has of common right power to make rules to regulate the practice of the Court, provided it do not abridge the right of the subject, or contravene any enactment. See *Mellish v. Richardson*, 9 Bing. 125.

ceedings in Courts of Admiralty and in the Prize Court, will in the course of this volume be fully considered.

CHAP. V.
SECT. I.

At first the respective Courts adhered to their appropriate jurisdiction, but each soon attempted to extend its powers. The superior Courts, in many respects, succeeded in those attempts, but the inferior Courts were, in general, effectually restrained from any considerable invasion or increase of jurisdiction by the defendant's plea to the jurisdiction or by the writ of prohibition, hereafter noticed. Now, however, as observed by Sir John Nicholl, (*q*) "times are changed—a more liberal and enlightened view of questions of jurisdiction is taken,—on the one hand, the Ecclesiastical Courts have no disposition to encroach '*ampliare jurisdictionem*;' and on the other hand, Temporal Courts have no jealousy, no wish to resort to fictions and to technicalities, they look (where not bound by former decisions directly in point) to the real substance and sound sense of the question, to that which is really most beneficial to the suitors, the public and subjects of the country. There is quite as much business in all the Courts as, under the increase of wealth and population, the institutions are able to discharge." (*q*)

Attempts of each Court formerly to extend its jurisdiction.

If a Superior Court of Common Law, (*r*) or a Court of Equity, (*s*) or a Criminal Court, (*t*) or an Ecclesiastical Court, (*u*) assume a jurisdiction which it clearly has not, the proceeding will in general be wholly void, and even the officer enforcing its sentence will be liable to an action; and, in general, the defendant may stay the proceeding by plea to the jurisdiction or by writ of prohibition. (*x*) And even where there is a local franchise to hold Courts in a particular district, the sheriff is not bound to execute there the process of a superior Court, because he might thereby be subjected to an action on the case for injuring such franchise, (*y*) though if he had actually arrested the defendant within the franchise the suit might have proceeded, because the superior Court has jurisdiction, subject to the interference of the owner of the franchise. (*z*)

Consequence of a Court not having jurisdiction wrongfully assuming it.

(*q*) *Grignion v. Grignion*, 1 Hag. Ec. Rep. 545; and see the concluding part of that case, where that excellent judge speaks with such becoming diffidence upon his knowledge respecting the rules of Courts of Equity, and alludes to the great importance of preserving the boundaries of jurisdiction as judicially designated, and admirably shews why Courts of Equity should, in certain cases, have exclusive jurisdiction. See also 2 Burn's Ecc. Law, tit. Courts, 52, 53; and per Willes, Ch. J. in *Cheesman v. Hoby*, Willes, 680.

(*r*) 2 Bulstr. 64; 10 Coke, 76 a.

(*s*) *Attorney General v. Hotham*, 3 Russ. 415.

(*t*) *Rex v. Haynes*, 1 Ry. & Mood. 293.

(*u*) *Beaurain v. Sir W. Scott*, 3 Camp. 388; *Rex v. Jenkins*, 1 B. & Cress. 655; 3 Dowl. & R. 41, S. C.; but see *Ackley v. Parkins*, 3 M. & S. 411.

(*x*) Bac. Abr. Prohibition, and see post fully.

(*y*) *Adams v. Osbaldiston*, 3 B. & Adol. 489.

(*z*) *Id.*; *Carrett v. Smallpage*, 9 East;

CHAP. V.
SECT. I.

The enumera-
tion of the Supe-
rior Courts in
general.

The Courts of
Law of original
jurisdiction.

The Courts of
Equity.

The Ecclesias-
tical or Spiritual
Courts, &c.

The Courts of
Error from judg-
ments of the
Superior Courts
of Law.

The Superior Courts, usually on account of their locality termed in statutes "*The Courts at Westminster*," are those of Law and those of Equity. Of the former (having jurisdiction principally over *legal* claims and *legal* defences, and some other peculiar matters) are—1st. The King's Bench; 2d. The Common Pleas; and 3d. The Exchequer; and the jurisdiction of these, as regards most *personal* actions, is nearly concurrent, though in respect of other actions and proceedings it is in many respects dissimilar.

The Courts of *Equity*, principally for enforcing mere *equitable* claims, or claims in some respects imperfect at law, and for giving effect to *mere equitable* defences, are the Court of Chancery, held before the Chancellor, the Court of the Master of the Rolls, the Vice-Chancellor's Court, and the equity side of the Court of Exchequer, holden before the Chief Baron, or under two modern statutes, before one other of the barons. (a) The more particular *jurisdiction* of each will be presently considered in due order, and the varying *practice* of each will form the principal subjects of this volume.

The *Ecclesiastical* Courts have jurisdiction principally over rights and injuries, private or public, of a *spiritual* or *ecclesiastical* nature; as questions upon the legality of a marriage and the propriety of divorce, and the right of a wife to alimony—questions relative to wills of personal property, probates, letters of administration, legacies and distribution of assets,—defamation imputing a spiritual offence, and not actionable or punishable at law,—and certain spiritual offences, as adultery, incest, fornication, brawling in churches, and many other offences against religion or morality. The Courts are principally the Archdeacons, Consistory, Peculiars, Arches, and Prerogative Courts. The jurisdiction of and practice in all these and other principal Courts will be fully considered.

The Court of *Exchequer Chamber* is a Court of *Error* for revising the judgments of the three Superior Courts of *Law* in matters of *law*, and is holden before the judges of the two Courts not concerned in the judgment impeached, viz. The 1 Wm. 4, c. 70, s. 8, enacts, that writs of error upon any judgment given by any of the said three Courts shall hereafter be made returnable only before the judges, or judges and barons as the case may be, of the other two Courts in the Exchequer

333; *Sparkes v. Spink*, 7 Taunt. 311; *Bell v. Jacobs*, 4 Bing. 523; but in *Rex v. Mead*, 2 Stark. R. 205, it was held not to be murder to kill a bailiff in resisting the execution of mesne process, if the

bailiff was attempting to execute a writ without a *not omittas* clause in an exclusive liberty.

(a) 57 Geo. 3, c. 18; 3 & 4 Wm. 4, c. 41, s. 25.

Chamber, any law or statute to the contrary notwithstanding; and that a transcript of the record only shall be annexed to the return of the writ, and the Court of Error, after errors are duly assigned and issue in error joined, shall, at such time as the judges shall appoint, either in term *or vacation*, review the proceedings and give judgment as they shall be advised thereon, and such proceedings and judgment, as altered or affirmed, shall be entered on the original record, and such further proceedings as may be necessary thereon shall be awarded by the Court in which the original record remains; from which judgment in error no writ of error shall be or be had, except the same be made returnable in the High Court of Parliament. So that under this statute the judges of the Court of Common Pleas, together with the barons of the Exchequer, constitute the Court of Error upon a writ of error from the judgment of the Court of King's Bench; and the judges of King's Bench, together with the barons of the Exchequer, constitute the Court of Error upon a writ of error in the judgment of Common Pleas; and the judges of King's Bench and of Common Pleas, constitute the Court of Error from a judgment of the Court of Exchequer.

The High Court of Parliament is a Court of Error not only from judgments in error of the Court of Exchequer Chamber, but also the Court of Appeal from decrees and proceedings in Chancery. The nature and extent of the jurisdiction of the House of Lords as a Court of Error will hereafter be fully considered.

The High Court of Parliament as a Court of Error from Exchequer Chamber and of appeal from Chancery.

Formerly the Court of Delegates, and from thence occasionally a Commission of Review, were the Court of Error or Appeal from the decrees and proceedings of the superior Ecclesiastical Court and the Court of Admiralty and Prize Court, and from Foreign Courts, but that jurisdiction has been repealed by 2 & 3 Wm. 4, c. 92, and the Privy Council is now constituted the Court of Appeal in such cases. And the 3 & 4 Wm. 4, c. 41, constitutes "*The Judicial Committee of the Privy Council*" the Court of Appeal from the Court of Admiralty in causes of *prize*, and from the decisions of various Courts of judicature in the East Indies, and in the plantations and colonies in America, and other dominions of his Majesty abroad. The jurisdiction and practice of these High Courts of Appeal will hereafter be fully considered.

The Privy Council and the Judicial Committee of the Privy Council.

The legal and equitable jurisdiction of the Courts of Bankruptcy, including that of the Court of Review, constituted by

The Courts of Bankruptcy.

CHAP. V.
SECT. I.

The principal distinctions between the jurisdictions of all these several Courts.

1 & 2 Wm. 4, c. 56, will be noticed towards the conclusion of this chapter.

Courts of *law*, as regards private injuries, in general only afford redress for *injuries* to *legal* rights and give effect to *legal* and not to equitable defences; whilst Courts of Equity cannot (excepting in a few cases where Courts of Law and of Equity have *concurrent* jurisdiction, and in some other cases where it acts *in aid* of a suit at law,) interfere where the right is legal, but are confined in jurisdiction to redress for injuries to *equitable* rights not recognized at law, and to *equitable* defences not available at law. On the other hand, Ecclesiastical Courts have peculiar cognizance of and jurisdiction over all *matrimonial* questions, and incidentally alimony, and over all *testamentary causes* relating to personal property, as respecting the validity and probate of wills of *personalty*, and over verbal defamation, imputing only some spiritual offence not cognizable nor punishable in the temporal Courts. But although these general rules are simple, they are in their application frequently difficult, and require full knowledge of the nature of rights, injuries and remedies, and even then much consideration in many peculiar cases.

Another important distinction at present exists between proceedings in Courts of Law and those in Equity or Ecclesiastical Courts, viz. that in the former, whenever a *debt* of £20 can be sworn to exist, the defendant may be arrested, and must remain in prison or find bail as a security for his forthcoming at the termination of the action; whilst, with the exception of a writ of *ne exeat*, to prevent a defendant leaving the kingdom, a defendant in equity or an ecclesiastical suit can only be served with process or cited and merely required to enter his appearance, and the complainant has no security, in case he should leave the country, and the decree is in general only *in personam* by attachment for the contempt in not obeying the decree, though at law the plaintiff may immediately after judgment in his favour, issue process for the debt or damages and costs recovered, and take in execution the personal property, real estate or person of the defendant, circumstances much in favour of the jurisdiction of Courts of Law. (b) However, a Court of Equity has power in many cases to order the payment of the fund or money in dispute into Court at an early stage; (c) a

(b) 2 Mad. Ch. Pr. 468 to 474; Smith's Ch. Pr. 323 to 344.

(c) *Jervis v. White*, 6 Ves. 737; *Mills*

v. Hanson, 8 Ves. 67; Smith's Ch. Pr. 517, 518.

power which no Court of Law exercises excepting as a condition for granting a favour, as a new trial. And a Court of Equity may, after a person has been imprisoned for his contempt in not obeying a decree for some time, *sequester* his personal estate and the rents and profits of his land; (d) and the new acts, 1 Wm. 4, c. 36; 2 Wm. 4, c. 58, have in some other respects extended the jurisdiction in equity; but we shall in the course of this volume find that the jurisdiction in equity is still incomplete as regards the mode of enforcing its decrees.

SECT. II.—*Of the Jurisdiction and Practice of the Courts of Law at Westminster in general.*

It would be curious and somewhat entertaining to trace the history of the struggles of the respective Courts of Law and Equity at Westminster for jurisdiction, but an outline of the *present* jurisdiction must here suffice. In former times not only Courts of Law and Equity were continually invading each other's distinct jurisdiction, (e) but each superior Court of *Law* indecorously struggled with the other to extend its own jurisdiction by reciprocal invasions. Hence formerly all those devices and inventions in the practical proceedings, as the feigned form of *Latitat*, *Quare Clausum Fregit* and *Quo Minus*, which were unworthy contrivances to acquire or retain jurisdiction calculated to degrade as well the inventors as the administration of justice. It is indeed just ground of congratulation that in our time many of the ancient fictions and absurdities have been abolished, and that attempts have been made (in a degree successful) to establish a *uniformity* of *process* and *practice* in all the three principal Courts of *Law*, by 1 Wm. 4, c. 70, s. 11, and 2 Wm. 4, c. 39, and an opening has been made for introducing conciseness and a general amelioration of *pleading*, by 3 & 4 Wm. 4, c. 42, s. 1, 23, 24, and by the consequent rules of Hilary Term, 1834; and the judges of all the Courts are by those statutes invested with ample *powers* from time to time to make *new rules* for the improvement of the *practice* and *pleading*; powers which they are certainly at present anxious to exercise for the benefit of the suitors and the credit of the profession. But still it is to be regretted that no *general code* of precise jurisdiction and of uniform practice, to be peremp-

Outline of the jurisdiction of each Court.

(d) *Ante*, 310, n. (c); Smith's Ch. Pr. 323.

(e) *Read v. Brookman*, 3 T. R. 151; *Ex parte Greenaway*, 6 Ves. 812; *Kemp v. Pryor*, 7 Ves. 249; Bac. Ab. tit. Courts;

1 Mad. Ch. Pr. 25; *ante*, 307; Observations of Sir J. Nicholl in *Grignon v. Grignon*, 1 Hagg. Ecc. Rep. 545, *ante*, 307; and per Willes, Ch. J. in *Cheesman v. Hoby*, Willes, 680.

CHAP. V.
SECT. II.

Outline of the jurisdiction of each Court, whether formal or summary, or by way of appeal or error, or controlling inferior Courts, and when summary proceedings can or cannot be sustained.

torily observed in the three superior Courts of Law at Westminster, has not as yet been enjoined, so that it will be found that still in *many* respects the practice of one or more of those Courts differs materially from the others, and this even in the construction of a statute. (*f*) All these variations and contradictions will be noticed in the following pages. (*g*)

The jurisdiction of all these Courts is to be considered with reference, *first*, to the *subjects* of which they have original cognizance; *secondly*, to the course of proceedings, which are either *formal* or *summary*; and *thirdly*, the superintending jurisdiction over *other* Courts or jurisdictions: for it will be observed that (with the exception of the Court of Exchequer Chamber, the Privy Council, the Court of the Judicial Committee of the Privy Council, and the Judicial Court of the House of Lords, which are entirely or principally Courts of *appeal* from inferior tribunals,) almost all the other Courts have a threefold jurisdiction, viz, *first*, over certain *original suits* to be commenced and conducted there *formally*; *secondly*, over certain complaints and matters allowed by the common law or statute to be heard and determined *summarily*; and, *thirdly*, a jurisdiction over inferior tribunals either by *prohibition* to restrain them from improperly assuming a jurisdiction, or (at least in the King's Bench) by *mandamus* commanding them to act when they improperly neglect to proceed, and by way of *appeal* or *writ of error*. Thus all *actions* must be commenced, prosecuted and tried in a formal manner, as by explicit pleadings, i. e. a declaration, plea, replication, rejoinder, demurrer and judgment thereon, or an issue on a fact or facts tried by a jury, and a formal judgment thereon, in each of the superior Courts of Law; and certain other complaints must be conducted in formal suits in *Equity*, as by *bill*, *answer*, and *final hearing* and *decree*; and many suits in the Ecclesiastical Courts must be **PLENARY** or full and formal. On the other hand, by the established practice of each of these Courts, they have *summary jurisdiction* in numerous cases to afford redress on affidavit and motion, rule nisi, affidavits in answer, arguments on each side, rule absolute, and attachment to enforce their

(*f*) See one recent instance, viz. that in King's Bench the plaintiff cannot enter an appearance for the defendant after the vacation following the second term, *Budgen v. Burr*, 10 B. & Cres. 457; whereas in Exchequer he may enter the appearance at any time within four terms, *Cook v. Allen*, 3 Tyrw. Rep. 378.

(*g*) It is to be regretted that, with the

exception of Mr. Tidd's admirable work, all the other treatises on Practice, though in general ably composed, treat separately of the practice of the three Courts, and appear to *labour to continue the distinctions*, although the intent of the legislature and of the judges certainly is to *assimilate the practice* in all the Courts.

decision ; also a very general course of proceeding summarily against their own officers and attornies, solicitors and proctors practising in each Court, and by long established *usage*, over *warrants of attorney* to confess judgment in each Court ; and by *particular statutes*, over *awards*, *annuities*, *mortgages*, and claims of *landlords*, &c. The same distinction between formal and summary jurisdiction also prevail in the Ecclesiastical, Admiralty, and Prize Courts, where, instead of the proceeding being always by libel, answer and decree, the question may frequently be determined on petition or motion, &c.

It is of great importance not only to know the limits of these *formal* and *summary* jurisdictions, but to be able to decide when or not it will be judicious to adopt the latter. In general, suits must be *formal*, and it is only on matters of mere *practice* that each Court has, at *common law*, any jurisdiction in making rules ; a right, however, which is so established, that a Court of Error will not, in general, examine into the propriety of a rule made in the inferior Court. (h) In all other cases, not merely respecting the *practice* of each Court, the power to proceed summarily entirely depends upon *particular statutes*, without which they could not be sustained. In cases of doubt, whether a summary proceeding is in point of law sustainable, the safer course is to proceed more formally ; but when a summary proceeding is clearly permitted by law, it is not only less dilatory and expensive, but also often more effectual, and avoids difficulties that might be encountered in a formal suit. Thus, if an attorney has given an undertaking in that character, in reference to a pending suit, it may be enforced against him by *summary* proceeding ; although, if a formal suit were brought, the same undertaking might be considered void for want of stating the consideration as required by the statute against frauds. (i) The applicant's affidavit is also received by the Court, although, on the trial of an action, the evidence of a party to a suit is in general inadmissible. There is, however, one considerable objection to a summary proceeding, viz. that the party opposing it usually *swears last*, and unless there be two or more deponents swearing positively to the *same* matter in favour of the application having occurred at the *same time*, it not unfrequently happens that the party resisting the application will swear so positively in the negative, (knowing that two witnesses to the same fact are in general required to convict of perjury,) that the application fails ; though if the op-

(h) *Mellish v. Richardson*, 9 Bing. 125. *Greaves*, 1 Crompt. & Jervis, 372, 374 ;
(i) *Evans v. Duncombe*, and in *Re* and see *Hull v. Ashurst*, 3 Tyrw. R. 420.

CHAP. V.
SECT. II.

posing deponents had been examined as witnesses before a jury *viva voce*, their countenance or manner would have betrayed the untruth of their statement, and the plaintiff's case would have been established. Therefore, before a summary application should be attempted, the probability of the opponent's swearing so as to defeat it should be well considered. There is also a leading distinction between formal proceedings and summary motions, at least in Courts of *Law*, viz. that in general a plaintiff succeeding in a formal suit is certain of judgment for his costs, whilst upon a motion the Courts frequently exercise as much discretion over costs as a Court of Equity, and deprive the applicant of costs, although in other respects he may succeed. (k)

In many cases, when formal suits are not absolutely essential, the Courts, in order to save the expense of a proceeding which eventually may turn out not to be sustainable, permit the merits or propriety of the proposed proceeding to be discussed upon a *preliminary motion*, by granting a *rule to shew cause*, founded on the applicant's affidavit, *why a writ of habeas corpus, or mandamus, or prohibition, or quo warranto, or certiorari*, should not be issued, and then the opponent shews cause upon his affidavits, and the Court hear and determine upon the propriety of the required proceeding before it actually takes place, by which, in many cases, much useless trouble and expense is saved. The expediency of this preliminary measure was strongly advocated by the late Mr. Evans, as respects the writ of habeas corpus, and is now generally practised. (l)

It has been held in equity that a proceeding by summary application does not preclude the party from afterwards proceeding by formal bill to obtain the same object, if he proceed with a view to save his right of appeal; (m) and it has been decided that although a statute give an appeal to two commissioners, that summary remedy does not prevent the party from bringing a formal action to try the validity of the proceeding. (n)

Originally the three Superior Courts of Law, viz. King's Bench, Common Pleas, and Exchequer, had in most respects separate, distinct, and exclusive jurisdiction, viz. the *King's Bench* over *criminal matters and trespasses vi et armis* committed in the county where the Court sat; the *Common Pleas*,

The present co-extensive jurisdiction of all the Superior Courts of *Law* at Westminster, and exceptions.

(k) See a recent instance in *Clutterbuck v. Combes*, 5 B. & Adol. 402.

(l) See *ante*, vol. i. 691 to 696, and title Habeas Corpus Act, Chitty's Col. Stat. 344, note (b). The case of *Millard v. Millman*, 3 Moore & S. 63; *Barnett v.*

Harris, 2 Dowl. Rep. Pract. 31, proceeds on the same principle.

(m) *Wall v. Attorney-General*, 11 Price, 643.

(n) *Re Shaftesbury v. Russell*, 1 Barn. & Cres. 666; 3 Dowl. & Ry. 84.

exclusively over *real, personal, and mixed actions* between party and party, except in a few cases where the officers of another Court were concerned; and the *Court of Exchequer*, over all *revenue* matters. (n) But each of those Courts, by the contrivances alluded to, viz. by the writ of *latitat* in the King's Bench, supposing a trespass in Middlesex, the writ of *quare clausum fregit* in the Common Pleas, and the *quo minus* in the Exchequer, have long assumed a *coextensive jurisdiction* over *all personal* actions, when the right of the plaintiff is *legal* and not equitable, nor spiritual, ecclesiastical, or maritime, nor has arisen out of an illegal capture; (o) so that complainants (subject to a very few exceptions) now have in general, in all *personal* actions, the option of suing in either of the Courts. (p)

To this general rule there are exceptions, as that *officers* (q) of another superior Court, in respect of their duty to be in constant attendance there, and an *attorney* of another of the superior Courts, in respect of his duty to conduct or defend the causes of his clients there, must be sued in his particular Court, so that he may not be withdrawn from his duty. (r) But where the plaintiff is also such officer or attorney, then *his* privilege to *sue* in his own Court prevails against that of the defendant; (s) and though it was held in the King's Bench, that in the latter case the defendant could not be *arrested*, though he might be *sued* in the plaintiff's Court; (t) yet the Court of Exchequer in a subsequent case held the contrary, and that *attornies* and clerks of the Exchequer of Pleas might in that Court *arrest* as well as sue *attornies* of another Court. (u) *Serjeants* and their clerks are also privileged to be sued in the Common Pleas; (x) but *Barristers*, who may now practise in all the Courts, (y) have no privilege to be sued in any particular Court, although he is privileged from arrest or imprisonment whilst attending any Court or on the circuit: (z) and it has

Exceptions as to officers and attornies, &c. of each particular court.

(n) 5 Bla. C. 46.

(o) *Ante*, p. 1, 2.

(p) For the history of these contrivances, see Appendix to the first edition of Sellon's Practice, vol. i., and Gilbert's Practice, C. P.

(q) *Baker v. Swindon*, 1 Ld. Raym. 399; 3 Salk. 283, S. C.; *Cases Pr. C. P.* 104; *Pr. Reg.* 380; *Barnes*, 371, S. C.; *Tidd*, 80.

(r) *Duffy v. Oakes*, 3 Taunt. 166; *Willshire v. Lloyd*, 1 Dougl. 381; *Comerford v. Price*, *id.* 512; *Gardner v. Tesson*, 2 Wils. 42; *Atkins v. —*, 2 Chitty's Rep. 63; *Tidd*, 9th ed. 80, 81.

(s) *Elkins v. Harding*, 1 Crompt. & J.

345; *Bowyer v. Hopkins*, 1 Young & J. 119.

(t) *Pearson v. Henson*, 4 Dowl. & Ry. 73; *Tidd*, 9th ed. 80.

(u) *Bowyer v. Hoskins*, 1 Young & J. 199; *Pitt v. Pocock*, 2 Crompt. & M. 46; *Tidd*, 9th ed. 91.

(x) *Baker v. Swindon*, 1 Ld. Raym. 399; 3 Salk. 283, S. C.; *Tidd*, 80.

(y) This was declared by the king's warrant on the 24th April, 1834, enabling all barristers to practise in the Court of Common Pleas in term, giving the serjeants precedence. See warrant, 10 Bing. 571, *post*, Common Pleas.

(z) *Meekins v. Smith*, 1 H. Bla. 636; *Luntley v. —*, 1 Crompt. & J. 579.

CHAP. V.
SECT. II.

been recently decided, that a barrister may be sued in the London Court of Conscience: (a)

It is not judicially settled whether the Uniformity of Process Act, 2 Wm. 4, c. 39, affects the privilege of an officer or attorney to be *sued in his particular Court*. The first section of that act certainly abolishes the ancient necessity to sue a privileged person by any *particular form of process* different from that against ordinary persons, and prescribes a new general form of process, and enacts "that such process *may issue from either of the said Courts*;" but the nineteenth section continues all exemptions from arrest, and the statute contains no *express* clause taking away the right to be *sued* only in a particular Court, and, therefore, some authors insist that such privilege continues, (b) but another author appears to have considered that it no longer exists. (c) It is submitted, however, that so important a privilege continues, for the only object of the statute was to secure the same *form of process* in each Court, but without interfering with any *privilege*; and if the act is to be construed to take away the privilege of an attorney to be sued in his own Court, it might equally be construed to take away the privilege of a revenue officer to be sued in the Exchequer, and many other privileges which certainly were not intended to be affected by that act.

Revenue officers,

There is also a peculiar prerogative jurisdiction of the Court of Exchequer to remove into the Office of Pleas all cases touching the revenue of the crown, and if an action be brought in any other Court against any officer of revenue, whether of customs or excise, or otherwise in respect of any transaction connected with the execution of his office or duty, whether under process or otherwise, such action may be removed into the Court of Exchequer, on the alleged ground that as that Court is peculiarly conversant with all questions arising upon the construction of the revenue law, it is desirable that the propriety of the conduct of such officers should be there determined, (d) nor is it necessary that the king's interest should be in question. (d) But as such a prerogative is calculated to excite suspicion of partiality and favour to the officer, it would be for

(a) *Wettenhall v. Wakefield*, 10 Bing. 335.

(b) Chapman's King's Bench Practice, Addenda, 75; Tidd's Supplement, A.D. 1833, p. 65.

(c) Chitty, T. edit. Archbold's Pract. vol. i. 21; vol. ii. 632, and note (h).

(d) *Cawthorn v. Campbell*, 1 Anstr. 205; *Siddon v. East*, 1 Crompt. & J. 12;

and see *Hammond's case*, Hardr. 176; *Penney v. Bailey*, Bunb. 309; *Berkley v. Walters*, id. 306; *Lamb v. Gunman*, Parker, 143; *Re Kingsman*, 1 Price's Rep. 206; *Beningfield v. Stratford*, 8 Price, 584; Man. Exch. Prac. 161, 164; Bac. Ab. Court of Exchequer, B.; Vin. Ab. Court of Exchequer, P.; 3 Bla. Com. 44, note (24), id. see the practice.

the honour of the crown and its officers if it were annulled, or at least not acted upon. (e) When this prerogative proceeding applies, the Court of Exchequer interposes on motion, by ordering the proceeding to be removed into the Office of Pleas, and which order operates by way of injunction. The usual order in cases of this nature is, "that the action be removed out of the Court in which it is depending into the Office of Pleas, and that it be there in the same forwardness as in the other Court." The order however does not operate as a *certiorari* to remove the proceedings, but merely as a personal order on the party to stay them there, and of course requires the defendant in the action to appear, accept a declaration, and put the plaintiff in the same state of forwardness in the Office of Pleas as he was in the other Court. (f)

There is a privilege even more extensive in favour of an officer of the Court of Chancery, or other person sued for any thing done in that capacity, for that Court has jurisdiction to stay *by injunction or order* any suit against any person for executing the process of their Court, although it was issued irregularly, and a trespass committed. (g) And the Court of Chancery will not allow a person to bring an action at law for damages for an improper arrest under an attachment out of a Court of Equity, though it will refer it to the master to inquire what compensation he ought to receive. (h) The practice seems to be by injunction to restrain the proceeding at law, but without prejudice to any application the party may be advised to make to the Court of Equity for compensation; (i) or supposing sequestrators on process of a Court of Equity should have seized property claimed by a third person, his only course is to apply to the Court for leave to bring an action of ejectment or trover, or to be examined in the chancery suit as to his interest in the land or goods sequestered. (k)

Officers of
Courts of
Equity.

(e) The mode in which justice is at present administered in revenue causes in the Court of Exchequer is free from suspicion, but still it is to be regretted that such a prerogative should exist, or at least be exercised. Until lately special jurors in the Exchequer, when they found a verdict for the crown, had *two* guineas each, and only *one* guinea when they found for the defendant. And it is upon record, that if a special jurymen frequently found a verdict against the crown, or even hesitated, care was afterwards taken that he should not be on the jury. But these odious distinctions are no longer adhered to.

(f) Per Eyre, C. B. in *Cawthorn v.*

Campbell, 1 Anstr. 205, in notes.

(g) 1 Mad. Chan. Prac. 135 to 137; Smith's Chan. Prac. 342, 344, 345; *Frowd v. Lawrence*, 1 Jac. & W. 655; *Kaye v. Cunningham*, 5 Mad. 406; *id.* 297; 2 Swanst. 313; *Baily v. Devereux*, 1 Vern. 269; Chitty's Eq. Dig. 589; see post, Prohibition.

(h) *Batchelor v. Blake*, 1 Hog. 98; Chitty's Eq. Dig. 1482.

(i) *Frowd v. Lawrence*, 1 Jac. & W. 655; and references Smith's Chan. Prac. 342. See as to proceedings against sequestrators, who have seized property of a third person, Smith's Chan. Prac. 344, 345.

(k) *Brooks v. Greathead*, 1 Jac. & W. 178; Smith's Chan. Prac. 344.

CHAP. V.
SECT. II.

Where debt or
damages are
small.

In general these superior Courts have jurisdiction, however *small the debt or injury*, and at common law it is no answer or defence that the debt or damages to be recovered will be under forty shillings; and although there be a local Court, yet, if the case is not in all respects within its jurisdiction, or the complainant could not otherwise proceed therein, then he may sue in the superior Courts, but subject to the power of the judge to certify under 43 Eliz. c. 6, when the damages recovered are less than forty shillings, and thereby deprive him of costs; (l) for the smallness of the damages is no reason that the complainant should lose them. (m) There are however in most parts of England local inferior jurisdictions, usually called *Courts of Request*, or *Courts of Conscience*, very inconveniently varying from each other in their respective provisions, (n) some prohibiting suits for debts under £10, others under £5, and others under £2, from being brought in any other Court, and to be taken advantage of by the defendant in different ways, pointed out by each particular act, as by motion or plea or suggestion; (o) and sometimes containing a general prohibition from suing in any other Court, in which case the objection is even a ground of nonsuit. (p) As those local Courts have no jurisdiction to summon witnesses out of the jurisdiction, and in general all inferior Courts are confined to causes of action which originally arose within their jurisdiction, or at least where an account had been there settled, it might have been supposed that such Courts could not take cognizance of causes of action that had arisen out of their jurisdiction; it has however been decided, that in general when the defendant resides, and could have been served with process within the jurisdiction, the inferior Court may proceed, although the cause of action accrued elsewhere, and this, although the plaintiff was wholly ignorant of such residence of the defendant, and actually served him with process from the superior Court out of the inferior jurisdiction. (q) Hence the necessity for ascertaining when the debt is small, whether some local jurisdiction may not preclude the plaintiff from suing in

(l) *Wright v. Nuttal*, 10 Barn. & Cress. 492.

(m) *Ante*, vol. i. 28; *Tubb v. Woodward*, 6 T. R. 175; *Busby v. Fearon*, 8 T. R. 235.

(n) See the collection of these statutes by Mr. Tidd Pratt; and see Chit. Col. Stat. tit. Costs. A general act consolidating the enactments is required.

(o) See the statutes and notes in Chit. Col. Stat. tit. Costs; Tidd Pratt's Courts

of Request Acts.

(p) *Rex v. Johnson*, 6 East, 583; *Parker v. Elding*, 1 East, 352; *Doulson v. Matthews*, 4 T. R. 503; 1 Chit. on Pleading, 475, 476.

(q) *Graham v. Browne*, 2 Crompt. & J. 227; *Baildon v. Pitter*, 3 Barn. & Ald. 210; 1 Chitty's Rep. 635, S. C.; *Oaks v. Albin*, M'Clell. Rep. 502; *Spencer v. Holloway*, 15 East, 674.

a superior Court. So even where the defendant is an attorney, and could not have been sued in an inferior Court, if the damages recovered against him should be *under forty shillings*, the judge may certify under 43 Eliz. c. 6, so as to deprive the plaintiff of costs. (r)

The recent enactments 1 Wm. 4, c. 70, and subsequent acts, do *not alter the jurisdiction* of the Superior Courts at Westminster, excepting that the sect. 1, 13 and 14, add a *fifth judge* to each Court, and abolish the Courts of Sessions in Cheshire and Wales, and distribute and remove the *suits(s) then depending* in such Court, amongst the Courts at Westminster, viz., the power of amending the records of fines and recoveries suffered in the Welsh Courts, is transferred to the Court of Common Pleas, depending actions into the Exchequer, criminal prosecutions and informations in the nature of quo warranto into the Crown Office of the Court of King's Bench, and depending suits in equity into the Courts of Chancery or Exchequer, and leaving all *future* suits and proceedings to be instituted in one of those Courts, according to its appropriate jurisdiction. (t) The recent changes in the law principally alter only the *forms of proceedings*, and enforce a *uniformity of process* to bring the defendant into Court, either by summons or by *capias*, when the party is to be arrested, (u) and authorize all the fifteen judges, or at least eight of them, including the three chiefs, to make *general rules* for regulating the *proceedings* of *all* the three Courts, (x) and during five years, from 1 June, A.D. 1833, to make rules relative to *pleading*, to come into force after they have laid before parliament for six weeks. (y) But still each Court retains its antecedently existing jurisdiction of making rules for regulating their *own particular proceedings*, and continues their previous rules and peculiar practice in force, "*provided they be not repugnant to the general rules so made*;" (z) and accordingly the Court of Exchequer have promulgated such particular rules relating to the practice of their own Court; (a) and very recently the Court of

Alterations and extension of jurisdiction of Courts of law by recent acts.

(r) *Wright v. Nuttal*, 10 Barn. & Cress. 492.

(s) It was decided that a judgment on a *warrant of attorney* to confess judgment in one of the Courts of Great Sessions in Wales, given previously to 1 Wm. 4, c. 70, could not be entered up in the Court of Exchequer, as that instrument could not be deemed a *suit*. *Williams v. Williams*, 1 Crompt. & Jerv. 387; *Jones v. Clarke*, *id.* 447.

(t) 1 Wm. 4, c. 70, s. 14.

(u) 2 Wm. 4, c. 39.

(x) 1 Wm. 4, c. 70, s. 11; and see Rules Trin. Term, 1 Wm. 4, A.D. 1831, made thereon, and rules Hil. Term, A.D. 1832.

(y) 3 & 4 Wm. 4, c. 42, s. 1; and the Rules of Hil. Term, 1834, thereon, relating principally to pleading.

(z) 1 Wm. 4, c. 70, s. 11.

(a) See the General Rules of Court of Exchequer, Mich. Term, 1 Wm. 4; 1 Crompt. & Jerv. 270 to 285.

CHAP. V.
SECT. II.

By what circumstances the option to sue in a particular Court may be influenced.

Common Pleas has promulgated particular rules relative to the acknowledgment of deeds under the Fine and Recovery Act. (a)

Subject to the before enumerated exceptions, the great bulk of litigation between private subjects (consisting principally of *personal actions* and the action of *ejectment*) *may be* instituted in either of these three principal Courts at the option of the plaintiff. But still there are many circumstances, as well at law as in equity, or of a spiritual or ecclesiastical nature, not strictly of *jurisdiction*, but of essential importance to be considered, in preferring one Court to the other, and a few of which we will now endeavour to suggest.

These principally relate to, *first*, the nature of the question, whether of fact or law; thus, if it be *even* collaterally connected with the criminal law or corporation law, or parochial settlement, &c., the King's Bench may be preferable, because those subjects are there most frequently discussed, and consequently best understood. If on the other hand it relate to real property, or require a very full and deliberate investigation, then it may be advisable to proceed in the Court of Common Pleas; (b) whilst if the matter be connected with a revenue question or the subject of tithe, the Court of Exchequer should in general be resorted to; unless the interest of the crown or of a revenue officer be opposed to the complainant; because in general revenue and *tithe* questions are there most frequently discussed.

Secondly, Should be ascertained the probable favourable or adverse decision, opinion or even inclination of one or more of the judges of a particular Court, not only upon certain questions of *law*, but also upon some matters of *fact*, or ethics, or evidence affecting, or at least bearing upon, the point of *law* or *fact* to be decided in the particular case, or his sentiments upon the amount of *damages* that should be awarded in some actions connected with the feelings; as in actions for criminal conversation or for debauching a daughter, or for a libel, &c., or on the subject of *costs*, and differing from that of the other Courts or judges; and especially who will be the judge before whom the cause would probably be tried. (c)

(a) Stat. 3 & 4 W. 4, c. 74, s. 89; and rule C.P. Trin. Term, 4 W. 4, A.D. 1854.

(b) It is to be regretted that an exclusive jurisdiction over all conveyancing and real property questions, and actions of ejectment, has not been vested in or rather restored to this Court, as they would certainly be there better discussed and considered, and an uniform system of real property law established.

(c) More than mere allusion to examples might be improper; but it is well

known that in one Court there is a judge pre-eminently distinguished for his high constitutional principles and just views of the rights of the crown and of the subject, and who, in all trials between the king and the people, will always evince his opinion that the dignity of the crown is best upheld by the waiver of prerogative, when in competition with the just interests of the subject. In another Court a judge, distinguished for his profound general legal knowledge and excellent

Thirdly, The whole practice of all the three Courts, as it may apply to the particular suit or business, or at least when in any important respect it may differ in one Court from the other, should be considered, and whether on account of any difference it will be preferable, either as regards the principal stages in the cause, or some subordinate or collateral matter, or even in the more liberal allowance of costs, to proceed in one Court than in the others. (*d*)

Thus there is a difference in the practice of the Court of King's Bench and Common Pleas in favour of the former, as regards the lien of the plaintiff's attorney, when there is a cross suit or proceeding, and which difference would, when there are or likely to be cross actions or proceedings, render it advisable for the plaintiff's attorney to prefer the former Court; (*e*) for in the King's Bench the debt and costs of one action cannot be set off against those of another, without at least providing for the lien of the plaintiff's attorney being satisfied in full, (*e*) whilst in the Common Pleas (*f*) and in a Court of Equity (*g*) the attorney's lien is not allowed to prevent such set-off.

dispassionate decisions; and in the other Court of law a judge, justly celebrated for his perspicuity, especially in all subjects relative to patents and inventions, and before whom therefore a complicated patent cause might with confidence be tried. It will not be denied that in many cases, it is of the utmost importance, not only that the judge should be of general ability, but also be familiarly acquainted with the subject to be tried, for otherwise he will not be able to explain and observe upon to the jury the facts and law applicable to the case, and a just result will be endangered. Lord Mansfield was celebrated for his great knowledge of insurance and mercantile law, and, consequently, whilst he presided, an admirable system of mercantile law, as regarded those subjects, was established. Whilst it is well known that another judge was so entirely ignorant of insurance causes, that after having been occupied six hours in trying an action on a policy of insurance upon goods (Russia duck) from Russia, he in his address to the jury complained that no evidence had been given to show how Russia ducks (mistaking the cloth of that name for the bird) could be damaged by sea water and to what extent. In the time of the late Lord Kenyon we remember that verdicts for large damages were favoured in actions for all violations of morality and injuries to the feelings, and upon motives quite consistent with the existing principles of

law as explained by the late Lord Erskine. Whilst before another deceased judge the mere suggestion of conspiracy or fraud inclined him towards conviction, but yet who abstained from giving moral lessons from the bench; although another judge, carried away by the latter object, not unfrequently lost sight of the main point in the cause. These few instances are merely alluded to, in order to evince the expediency of some consideration of the tribunal to be selected.

(*d*) Thus in K.B. if the sentence against the *principal* for a criminal offence be under consideration, perhaps time might be given to put in bail, but not so in C. P. *Joyce v. Pratt*, 6 Bing. 377; but see *Bennett v. Kinnear*, 3 Moore, 259; *Ashmore v. Fletcher*, 13 Price, 523, *post*. So a warrant of attorney in the Exchequer, at least as regards a summary application for relief against it, may be a better security than in K. B. or C. P. *Matthews v. Lewis*, 1 Anst. 7; 2 Man. Ex. Pr. 500, *sed quære*; see *post*, Exchequer.

(*e*) Tidd's Pr. 9th ed. 339, 992; 3 B. & Cres. 535; 2 B. & Cress. 800; 4 T. R. 123; 6 T. R. 456; 8 T. R. 70; 1 Dowl. & R. 168.

(*f*) 8 Bing. 29; 1 Moore & Scott, 93, S. C.; 1 Dowl. Pr. Cas. 242; *Hall v. Ody*, 2 Bos. & P. 28; *Schoole v. Noble*, 1 Hen. Bla. 23; 4 Taunt. 632; 8 Taunt. 526.

(*g*) 15 Ves. 72, 539; 2 Ball & B. 54; *Hullock on Costs*.

CHAP. V.
SECT. II.

Fourthly, The arrear or state of business in the respective Courts, and the certainty or probability of obtaining a trial or decision sooner in one Court than the other, especially when an important witness, whose viva voce testimony may be material, is about to leave the kingdom, or reside at a great distance from the place of trial. (*k*)

Fifthly, Relating to the retainer or employment of one or more particular counsel, either of generally superior talent or influence in a particular Court, or of paramount knowledge of the particular question of fact or law, or particular ability in the examination of a known difficult witness, or of peculiar zeal upon some particular subjects of litigation, (*l*) and especially whether it be certain such counsel will attend during the whole trial, or upon argument, or upon a motion for a new trial, or in arrest of judgment, or perhaps be absent at some critical time; (*m*) and whether in case all the most efficient counsel practising in a particular Court should have been already retained for the defendant, it may not be advisable to proceed in another Court, or abandon the already commenced action, or whether it will be preferable specially to retain, even at an increased expense, a pre-eminent counsel usually practising in another Court, or on another circuit, and oppose him to those already retained by the defendant, or even for a defendant to file a bill in the Exchequer, and by an injunction there stay a trial. In a preceding page it was observed, that when the merits strongly preponderate in favour of one party, he will usually succeed with the assistance of *any* counsel; but it too frequently occurs, even at the present time, that extraordinary talent in a particular counsel will really prevail against the justice of the case. (*n*) There are also numerous other instances where judgment may be usefully exercised in the selection of a particular Court or remedy in preference to another, and which will be pointed out in the progress of this chapter.

Before the late act 1 W. 4, c. 70, sect. 8, successive writs of error were sustainable in certain cases from the judgment of

(*k*) Notwithstanding the now established power of enforcing the examination of witnesses abroad or about to proceed abroad on interrogatories, see *post*, 346, and 1 W. 4, c. 22; still it is frequently of the utmost importance to secure the actual attendance and examination of witnesses viva voce on the trial. And see *Macalpine v. Powles*, 3 Tyr. R. 871.

(*l*) At the time that Sir W. Garrow, my earliest patron at the bar, practised as an advocate, it is well known that his talent in cross examination very fre-

quently occasioned verdicts that would inevitably have been the other way, if the witness had been examined by any other counsel. And in such respect was his peculiar talent held, that most judges suspended for the time the practice of slowly taking down all that was sworn, in order to give full effect to his skilful and energetic mode of rapidly pressing varying questions in order to detect falsehood.

(*m*) See *ante*, 3d part, p. 71.

(*n*) *Ibid*.

the Court of Common Pleas into the Court of King's Bench, and afterwards from thence into the Exchequer Chamber, and then into the House of Lords, and which were certainly adverse to the Court of Common Pleas, and favourable to the King's Bench and Exchequer of Pleas; and these successive stages of delay were permitted contrary to the general principle that *multiplicity of appeals* ought not to be favoured, (o) and at that time, in order to avoid the delay incident to these proceedings, it was advisable, when the debt exceeded 50*l.*, or even when less, at an increased expense to be borne by the plaintiff, to commence the action by original writ returnable in King's Bench, in which case the writ of error must have been brought at once in the House of Lords. But now as that statute in all cases requires every writ of error upon the judgment of either of the superior Courts to be brought in the first instance in the Court of *Exchequer Chamber*, before the judges of the two other Courts, and upon the judgment in the Exchequer Chamber in the House of Lords, it follows that it is so far immaterial whether the action be commenced in the K. B., C. P., or Exchequer; and this act, together with the uniformity of process act, 2 W. 4, c. 39, have greatly tended to equalize the number of actions in each Court.

So, formerly, as only a serjeant could be heard in the Court of Common Pleas in support of or against a motion for a new trial, it became important to consider, before the commencement of the action, whether the counsel who would conduct the trial would or not be serjeants, and if not, then to proceed in the King's Bench; because the greatest inconvenience, if not loss, has arisen from a serjeant having to speak upon a new trial when he was not concerned in the cause at *Nisi Prius*, and consequently was comparatively ignorant of what had passed on the trial. But now, by the recent opening of the Court of Common Pleas to all barristers as well as serjeants, that objection has been judiciously removed. (p) These few of very numerous circumstances that may influence the choice of a particular Court, are stated only as instances, and to impress practitioners with the necessity for keeping in view the difference in the practice of the Courts, which will be enumerated in the course of this volume.

We will now proceed to state the jurisdiction of each Court in particular, and occasionally suggest the expediency, under

(o) *Parham v. Templer*, 3 Phil. Ec. Cas. 255. Per Sir J. Nicholl. "Although the law favours the right of appeal, yet it does not favour the multiplication of

appeals."

(p) See the king's warrant, 10 Bing. 571, 572; and *post*, Court of Common Pleas.

CHAP. V.
SECT. III.

particular circumstances, of proceeding in one Court in preference to another.

SECT. III.—*Jurisdiction of the Court of King's Bench.**First, Over Civil Matters.*

1. Formal actions.
 1. Personal actions.
 2. Mixed actions.
 3. Not over real actions.
2. Summary over
 - Habeas corpus.
 - Awards.
 - Annuities.
 - Mortgage Deeds.
 - Bail bonds and replevin bonds.
 - Warrants of attorney.
 - Officers of the Court, sheriffs, bailiffs.
 - Attornies and articted clerks,
 - Costs of election petitions.
3. Furtherance of the Court's own jurisdiction
 - Under interpleader act, 1 & 2 W. 4, c. 58.
 - Under commission and interrogatory act, 1 W. 4, c. 22.
 - In what respect has power to compel a discovery.
4. In aid of civil jurisdiction of other Courts, or in compelling them to act, or restraining them from acting, or on appeal from their decision.
 - In general.
 - Answering case from a Court of equity.
 - Trying an issue from such Court.

Enforcing judgments of inferior Courts.

Mandamus to compel inferior Courts, or officer, to act.

Prohibitions.

As a Court of error and appeal.

1. Formally.
2. Summarily, as between landlord and tenant.
3. In other cases.

Secondly, Over Criminal and Public Matters.

In general.

By indictment.

By criminal information.

Alteration of practice in giving judgment immediately after trial, &c.

By articles of the peace.

Informations in nature of quo warranto.

Criminal jurisdiction as a Court of appeal.

Formal by writ of error.

Summary by certiorari over convictions and orders.

Coroners' inquests.

Cases stated by Court of sessions.

Poor rate itself.

Assessments.

Settlements, orders of removal, &c.

Sewers, controul over commissioners.

III. The jurisdiction and general practice of the Court of King's Bench. (q)

The jurisdiction of the Court of King's Bench is by far the most extensive of all the Courts, whether of law or equity, for it has cognizance as well of all *criminal matters* as of *most civil injuries*, and has also considerable jurisdiction over matters collateral or distinct from any formal suit, and over inferior Courts. It administers justice either in *formal civil actions* decided upon demurrer on points of *law*, or by a jury trying formal issues of *fact*, or it affords justice *summarily* upon *affidavit*, *motion*, *rule nisi*, and *rule absolute*, and enforces the latter with *costs* by *attachment*. So as regards *criminal* and *public* proceedings, there will be found a similar distinction between *formal* indictments and informations, and more summary proceedings.

(q) See in general 3 Bla. Com. 41, Bench, A. 2; Com. Dig. Courts, B.; 2 109; Bac. Ab. tit. Courts of King's Inst. 23, 71, 550.

We have seen that originally the Court of King's Bench had merely jurisdiction over *criminal matters* and *trepasses vi et armis*, committed in the county where that Court happened to be, and actions against persons in the *actual custody* of the marshal, and against the *officers* and *attornies* of the Court, who were not to be compelled to answer elsewhere; and by the express terms of Magna Charta, 9 H. 3, c. xi., it was enacted that "*Common Pleas shall not follow our Court, (i. e. of K. B.) but be holden in a certain place.*" (r) At length, however, by feigning that a trespass had been committed in Middlesex, where the Court had then fixed, or that the defendant was in the custody of the marshal, the Court assumed and finally established a jurisdiction over *all personal actions*, though before only cognizable in the Court of Common Pleas. (s) So that (subject to the exceptions before noticed relative to officers and attornies of another Court, (t) and revenue officers, (u) and persons executing the process of the Court of Chancery, (x) and also subject to a few enactments requiring actions thereby given to be brought in the Exchequer,) it is now established that every complainant has the choice of commencing in the King's Bench all formal *actions of account*, (strictly so called,) *assumpsit*, *covenant*, *debt*, *detinue*, *case* of every description, whether for injury to the person, personal property, or real property, *trover*, *replevin* and all actions of *trespass vi et armis*, whether for direct injuries to the *person*, as for assault, battery, false imprisonment, or for direct injuries to *personal* or *real property* in England or Wales, or in the counties of Chester and city of Chester; (y) and this whether the cause of action arose in Middlesex or elsewhere in England, or any part of the world, with the exception of local injuries, where the real property affected was out of the kingdom; also, over writs of *scire facias* on records, whether recognizances or judgments, in favour of private individuals. Such extensive jurisdiction over *personal* actions appears to have been recently recognized and impliedly confirmed by the uniformity of process act, 2 W. 4, c. 39; and indeed it had been too long practised to be disputed with effect. (z) The ancient proceeding

(r) This extended as well to K. B. as to the Exchequer, and hence no real action could be brought out of C. P. except by the king, 2 Inst. 23; 2 Rol. Rep. 290.

(s) Ante, 311; Trys. Jus. Filizarii, 28; Tidd, 9th ed. 37; Sellon's Prac. 1st ed. Append. vol. ii.; 3 Bla. Com. 287.

(t) Ante, 315.

(u) Ante, 316.

(x) Ante, 317.

(y) 1 W. 4, c. 70.

(z) 3 Bla. Com. 287; Tidd, 150; Fulke v. Bourke, 1 Bla. Rep. 462; Barber v. Lloyd, 2 T. R. 513; 2 Saund. 52, note 1; 2 Chitty's Rep. 60.

CHAP. V.
SECT. III.

by *audita querela* (still in force, though not used in practice, in consequence of a summary motion for relief having been in general substituted,) is sustainable in K. B. if the original action were in that Court; (a) and *scire facias* to repeal the king's *patents* are usually tried and determined in this Court. (b) With respect to *penal actions*, we have already shewn that a common informer cannot sue for a penalty unless he be expressly or impliedly authorized so to do, and in general the particular statute directs the Court in which the proceeding is to be instituted. (c)

Over what
mixed actions.

But the Court of King's Bench has no jurisdiction over *mixed actions*, excepting that of *ejectment*, (always laid *vi et armis*), (d) for even *quare impedit* (also a mixed action) can only be brought in the Court of Common Pleas, excepting when the king is the plaintiff, who may proceed in *quare impedit* in either of the superior Courts of Law. (e)

Not over real
actions.

As to *real actions*, the Court of King's Bench has *no original* jurisdiction in any real action, unless at the suit of the king, who has the choice of all his Courts. (f) So that if the Court of King's Bench were to issue a writ of grand cape to seize land in a real action, *commenced* in that Court, an action of trespass would be sustainable against the officer executing it; (g) and yet, singularly, before the 1 W. 4, c. 70, s. 8, writs of error upon a judgment of the Common Pleas in all real actions, were returnable and heard and determined in this Court; so that, although not competent originally to entertain such a suit, it was allowed, as a Court of Error, to controul and overrule the decision of the Court of C. P. (h)

Summary juris-
diction.

Besides this extensive jurisdiction over formal personal *actions*, this Court has, either at common law, or by particular statutes, very extensive *summary jurisdiction*. The summary proceedings in this Court of a *civil* nature, to obtain redress for some private injuries, are principally *habeas corpus*, or re-

(a) Fitz. N. B. 105, 106; 2 Sell. 359; see *Practice in Audita Querela*, 2 Man. Ex. Pr. 376 to 382.

(b) 4 Inst. 72; and see *Haworth v. Hardcastle*, 10 Bing. 551. *Scire facias* to repeal a patent lies at the suit of a private person, if prejudiced thereby, *Brewster v. Weld*, 6 Mod. 229. But costs not recoverable, *Rex v. Miles*, 7 T. R. 367; *The King v. Bingham*, 1 Tyr. R. 262; Tidd, 1094, 5, 6; Com. Dig. tit. Patent, F.; 2 Saund. R. 5 ed. 73, o. p.

(c) *Ants*, vol. i. 25 a.; *Fleming v. Barley*, 5 East, 313; and see in general

1 Tidd, 517 to 520.

(d) 2 Inst. 23; Com. Dig. Courts, B. 1.

(e) Com. Dig. Courts, B. 1, B. 2; 4 Inst. 71; Fitz. N. B. 32, e.; Sellon's Prac. 1 ed. vol. ii. 321; Tidd, 734, 870, 946.

(f) Com. Dig. Courts, B. 2; Bac. Ab. Court of King's Bench, A. 2.

(g) *Weaver v. Clifford*, 2 Bulst. 64; *Marshalsea Case*, 10 Coke, 76 a.

(h) As in *Formedon*, *Cockerell v. Chalmondeley*, 10 B. & Cres. 564; in *quare impedit*, *Gulley v. Bishop of Exeter*, 10 B. & Cres. 584

lating to *awards*, *as bonds*, *warrants of bailiffs*, *attornies*, and summary proceeding *act* must be very strict

The *habeas corpus* stated in the preceding Court of C. P. original and the Exchequer only, the Court of King's Bench at all times, were a party was in custody since the *habeas corpus* c. 100, all the superior barons have equal and of *habeas corpus*, and each judge and baron at the peril of forfeiting

in practice it is advisable to apply to the Court of King's Bench or one of its judges, *in preference* to any other Court or judge, in all cases where a party is illegally imprisoned under colour of the process or proceedings of that Court, or upon any *criminal charge*, or upon a commitment of *commissioners of bankrupt*, (i) or upon an illegal sentence or proceeding of an Ecclesiastical Court, (m) or under a commitment by the chief justice of K. B., (n) or upon the supposition of an offence against the *revenue* having been committed: *first*, because the judges of K. B. are more in the practice of considering and deciding upon criminal subjects, and the requisite forms of process, warrants, convictions, orders, and commitments, than the other Courts; and this Court, as observed by Lord Holt, is the constitutional protector of the liberty of the subject; *secondly*, because the legality of imprisonments for alleged offences against the revenue, probably upon the charge of some interested officer, require strict and impartial investigation, and this Court is as much bound to take care of the liberty of the subject as to protect the revenue from fraud. Accordingly in all cases of criminal charges and of illegal or irregular imprisonments under statutes for the protection of the revenues of cus-

frauds and inconveniences, has given each of certain cases. the imprisonment; the but also to high trying the men days at

CHAP. V.
SECT. III.

328

CHAP. V.
SECT. III.

Annuities. (x).

(i) *Jones v. Fitzaddams*, 3 Tyr. R. 904; *Baynes v. Baynes*, 9 Ves. 462.

(j) *Ante*, vol. i. 684 to 695; and see the statutes at length, Chit. Col. Stat. False Imprisonment, 344 to 349.

(k) 31 Car. 2, c. 2, s. 10.

(l) *Ex parte Harrison*, 1 B. & Adol.

410.

(m) *Vern.* 24; *Sid.* 181; *Keh.* 689; *R. v. Jenkins*, 1 B. & C. 655; *R. v. Dugger*, 5 B. & Ald. 791; see *post*, Ecclesiastical Courts.

(n) *Per Holt*, C. J. *Salk.* 359.

CHAP. V.
SECT. III.

toms, excise or taxes, it is advisable to apply to this Court.(o) This Court also has peculiar power not only to *discharge*, if the imprisonment upon a criminal charge be wholly illegal, but also to *bail* the party, although in custody, for supposed high treason or capital felony.(p) But where the imprisonment is under the *civil* proceeding of any other Court, then the application for an habeas corpus may be more properly made to the Court out of which such process issued. The *practice* in obtaining an habeas corpus, or a more summary discharge from imprisonment, has been stated in the preceding volume.(q)

Awards.

So in order to enforce or to appeal against an *award* or *umpirage*, the statutes of 9 & 10 Wm. 3, c. 15, and 3 & 4 Wm. 4, c. 42, s. 39, 40, 41,(r) create a *summary* jurisdiction, in giving effect to, or setting aside, or modifying the decision of the arbitrator, constituted a private judge by the consent of the parties, and whether or not there has been any action depending, this Court has jurisdiction in cases where there has been a *written agreement that the submission to arbitration may be made a rule of this Court*, and the same has accordingly been made *such rule*. The proceedings in these cases have already been noticed.(s) When by the terms of the submission it has been agreed that it may be made a rule of this *or any other Court*, it will in general be found best to apply to this Court, because the very constant practice on these subjects has induced a particular facility of decision in K. B. The Court can also by attachment as effectually enforce specific performance of the award as a Court of Equity.(t) But we have seen that it has been considered, that when once the submission has been made a rule of any one of the Courts, an attachment cannot be moved for in any other Court, although one of the causes referred was depending in the latter.(u) And in general, if an agreement of reference has been made a rule of a Court of Law, a Court of Equity cannot give relief even on the ground of fraud, or other circumstance usually constituting the particular ground for proceeding in a Court of Equity.(v)

(o) See the instances and observations *Ex parte Pain*, 5 B. & C. 251; *Kite and Lane's case*, 1 B. & C. 101; 2 D. & R. 212; *In re Nunn*, 8 B. & C. 644; 3 Man. & R. 75; *Debell's case*, 4 B. & Ald. 243.

(p) 4 Inst. 71.

(q) *Ante*, vol. i. 691 to 696.

(r) See these acts set forth, *ante*, this volume, 80 to 83.

(s) *Ante*, this volume, 73 to 126.

(t) *Ante*, 122 to 124.

(u) *Ante*, 123, note (r); *Wispenny v. Bates*, 2 Crompt. & J. 379.

(v) *Auriol v. Smith*, 1 Turn. & Rus. 124 to 126; *ante*, this volume, 124, 125.

The legislature, in order to prevent the frauds and inconveniences so frequent in annuity transactions, has given each of the superior Courts *summary jurisdiction* in certain cases. The 17 G. 3, c. 26, now obsolete, was the first enactment; the act now in force is the 53 G. 3, c. 114. Sect. 2, requiring the *memorial* of the transactions, enacts, "that within thirty days after the execution of every deed, bond, instrument, or other assurance, whereby any annuity or rent-charge shall after the 14th July, 1813, be granted for one or more life or lives, or for any term of years, or yearly estates determinable on one or more life or lives, a *memorial* of the date of every such deed, bond, instrument or other assurance, of the names of the parties and of all the witnesses thereto, and of the person or persons for whose life or lives such annuity or rent-charge shall be granted, and of the person or persons by whom the same is to be beneficially received, and of the pecuniary consideration or considerations for granting the same, and the annual sum or sums to be paid, shall be enrolled in the High Court of Chancery in the form *or to the effect following*, with such alterations therein as the nature and circumstances of any particular case may reasonably require, *otherwise every such deed, bond, instrument, or other assurance, shall be null and void to all intents and purposes*," and the form of the memorial in appropriate columns is then prescribed.

The 5th section gives a judge of K. B. or C. P. (omitting Exchequer and Courts of Equity) summary power, by summons and order, to compel the delivery of a copy of the deed to any applicant, and power to examine with the original.

Sect. 6 enacts, that if any part of the consideration for the purchase of any such annuity or rent-charge shall be returned to the person advancing the same, or in case such consideration or any part of it shall be paid in notes, if any of the notes, with the privity and consent of the person advancing the same, shall not be paid when due, or shall be cancelled or destroyed without being first paid, or if such consideration is expressed to be paid in money, but the same or any part of it shall be paid in goods, or if the consideration or any part of it shall be retained on pretence of answering the future payments of the annuity or rent-charge, or any other pretence, in all and every the aforesaid cases it shall be lawful for the person by whom the annuity or rent-charge is made payable, or whose property is liable to be charged or affected thereby, *to apply to the Court in which any action shall be brought for payment of*

(x) See former act, 17 G. 3, c. 26, and present act, 53 G. 3, c. 141; 3 G. 4, c. 92; 7 G. 4, c. 75.

CHAP. V.
SECT. III.

the annuity or rent-charge or judgment entered, by motion to *stay proceedings* on the action or judgment; and if it shall appear to the Court that such practices as aforesaid, or any of them have been used, it shall and may *be lawful* for the Court to order every deed, bond, instrument, or other assurance, whereby the annuity or rent-charge is secured, to be cancelled, and the judgment, if any has been entered, to be vacated.

The statute contains other enactments declaring void all annuities as to *infants*, and relative to extortion of annuity brokers, and exceptions with respect to annuities charged on property of adequate value, whereof the grantor was seised in fee, &c.

In considering the practical application of this statute, the distinction between the general jurisdiction of the Court over warrants of attorney, and the particular power given by the 6th section to the Court to interfere on summary motion, should be constantly kept in view. The first section declares the instruments *void* in cases where there ought to be, but has not been, a proper memorial; but that section gives the Court no power to interfere *summarily* to set aside any *deed* or instrument on account of a defect in the memorial; and, therefore, when *that* is the objection, although the deeds are void, yet no motion to the Court of Law can be made excepting to set aside a warrant of attorney, constituting one of the securities, and then that summary motion is founded principally upon the common law jurisdiction of the Court over warrants of attorney authorizing a judgment in that Court.^(y) But when a case can by affidavits be brought within the precise terms of the 6th section, then a Court of Law has power (at least when an action is depending) to order the *deeds* and all other securities to be cancelled; but which enactment is not imperative, but *merely discretionary*, to vacate securities either absolutely, or on terms, according to the circumstances and justice of each case.^(z) And even where too large a sum had been retained by the grantee's attorney with his knowledge, the Court refused to set aside the securities altogether, but referred the matter to the master to report what part of the sum charged for costs should be deducted.^(z)

(y) Per Cur. 1 June, A.D. 1829, the Court said that they had no jurisdiction to interfere on motion to set aside deeds, except in the few cases mentioned in the 6th sect.; but the Court ordered the warrant of attorney to be delivered up; and see decision on 17 G. 3, Tidd, 522, note (f), and where the warrant of attorney authorized only a judgment in C. P., but by mistake a judgment had been

signed in K. B., the latter Court ordered the *judgment* to be set aside, but said they had no jurisdiction to order the warrant of attorney to be cancelled. 6 East, 241 a. As to the *Common Law* jurisdiction over warrants of attorney, *post*, 335, 6.

(z) *Girdlestone's case*, K. B. 24th June, 1829, MS.; and see 1 B. & C. 61; 4 B. & Ald. 281; 6 B. & Ald. 61.; 1 Bing. 316.

In a late case in the Common Pleas, the Court refused to hear a rule for setting aside an annuity, because it appeared that it had not been *bonâ fide* obtained on behalf of the grantor himself, but of a third person, who had agreed to purchase the interest of the grantee, but attempted to raise the objection in order to get rid of his agreement. (a)

Courts of Equity have more extensive jurisdiction to cancel *annuity deeds* than a Court of Law, and therefore in some cases, especially those where the deeds constitute a cloud over or incumbrance upon an estate, it may be preferable to file a bill in a Court of Equity in the first instance, because, as we have seen, Courts of Law cannot order the deeds to be cancelled, excepting in the few instances enumerated in the sixth section, and are even then frequently reluctant to interfere. (b)

When a *legal* estate was originally conveyed by way of mortgage, or had become forfeited, the mortgagor, although ready and offering to pay the debt, had no relief in a Court of Law, but was compelled to resort by formal suit to a Court of Equity for an account, and to redeem, and which he could not do before the hearing in equity; (c) but now the statute (c) 7 Geo.

Mortgage-
deeds.

(a) *Fairecloth v. Gurney*, 9 Bing. 456. 710. Besides a Court of Law has not
(b) *Underhill v. Horwood*, 10 Ves. by the act power to compel a reconvey-
218; *Holbrook v. Sharpe*, 19 Ves. 151; ance as a Court of Equity can.
1 Mad. Ch. Pr. 227, 228; ante, vol. i.

(c) 7 Geo. 2, c. 20, "An Act for the more easy Redemption and Foreclosure of Mortgages."

Whereas mortgagees frequently bring actions of ejectment for the recovery of lands and estates to them mortgaged, and bring actions on bonds given by mortgagors to pay the money secured by such mortgages, and for performing the covenants therein contained, and likewise commence suits in his Majesty's Courts of Equity to foreclose their mortgagors from redeeming their estates, and the Courts of Law, where such ejectments are brought, have not power to compel such mortgagees to accept the principal monies and interests due on such mortgages and costs, or to stay such mortgagees from proceeding to judgment and execution in such actions, but such mortgagors must have recourse to a Court of Equity for that purpose, in which case likewise the Courts of Equity do not give relief until the hearing of the cause: For remedy thereof and to obviate all objections relating to the same, enacts that where any action shall be brought on any bond for payment of the money secured by such mortgage or performance of the covenants therein contained, or where any action of ejectment shall be brought in any of his Majesty's Courts of Record at Westminster, or in the Court of Great Sessions in Wales, or in any of the Superior Courts in the Counties Palatine of Chester, Lancaster, or Durham, by any mortgagee or mortgagees, his, her, or their heirs, executors, administrators, or assigns, for the recovery of the possession of any mortgaged lands, tenements, or hereditaments, and no suit shall be then depending in any of his Majesty's Courts of Equity in that part of Great Britain called England, for or touching the foreclosing or redeeming of such mortgaged lands, tenements, or hereditaments, if the person or persons having right to redeem such mortgaged lands, tenement, or hereditaments, and who shall appear and become defendant or defendants in such action, shall at any time pending such action pay unto such mortgagee or mortgagees, or in case of his, her, or their refusal, shall bring into Court where such action shall be depending all the principal monies and interest due on such mortgage, and also all such costs as have been expended in any suit or suits at law or in equity, upon such mortgage, (such money for principal, interest, and costs to be ascertained and computed by the Court where such action is or shall be depending, or by the proper officer by such Court to be appointed for that purpose,) the monies so paid to such mortgagee or mortgagees, or brought into such Court, shall be deemed and taken to be

CHAP. V.
SECT. III,

2, c. 20, affords mortgagors extensive *summary relief at law* upon bringing the principal money and interest into the Court in which the proceeding at law is depending, and upon affidavit and motion praying the Court to stay the proceedings of the mortgagee in *ejectment*, or even in an action of *covenant* or debt, on a *mortgage deed* or bond, (a) and by rule of Court compelling the mortgagee to reconvey and return the title-deeds; (b) and although the statute contains some exceptions, yet it is in general very liberally construed, so as to extend the summary relief at law and save the expense of a bill in equity to redeem. (c) But the third section of this act provides that it shall not extend to any case where the person against whom the redemption shall be prayed shall, by writing signed by him or his agent, insist before the mortgage-money has been brought into Court that the party praying a redemption has not a right to redeem, or that the mortgaged premises are charged with other money, or the right to redeem does not otherwise exist as stated in the act. The Court of Exchequer refused to interfere where the right to redeem was disputed upon affidavits, and it was held that this act was meant only to apply

in full satisfaction and discharge of such mortgage, and the Court shall and may discharge every such mortgagor or defendant of and from the same accordingly, and shall and may by rule or rules of the same Court compel such mortgagee or mortgagees, at the costs and charges of such mortgagor or mortgagors, to assign, surrender, or reconvey such mortgaged lands, tenements, and hereditaments, and such estate and interest as such mortgagee or mortgagees have or hath therein, and deliver up all deeds, evidences, and writings, in his, her, or their custody, relating to the title of such mortgaged lands, tenements, and hereditaments unto such mortgagor or mortgagors who shall have paid or brought such monies into the Court, his, her, or their heirs, executors, or administrators, or to such other person or persons as he, she, or they shall for that purpose nominate or appoint.

Sect. 2 enacts, that on bills to foreclose, the Court, on the defendant's request, may proceed to a decree before a regular hearing.

Sect. 3. Provided always, that this act or anything herein contained shall not extend to any case where the person or persons against whom the redemption is or shall be prayed shall (by writing under his, her, or their hands, or the hand of his, her, or their attorney, agent, or solicitor, to be delivered before the money shall be brought into such Court at Law, to the attorney or solicitor for the other side,) insist either that the party praying a redemption has not a right to redeem or that the premises are chargeable with other or different principal sums than what appear on the face of the mortgage, or shall be admitted on the other side, nor to any case where the right of redemption to the mortgaged lands and premises in question in any cause or suit shall be controverted or questioned by or between different defendants in the same cause or suit, nor shall be any prejudice to any subsequent mortgagee or mortgagees, or subsequent incumbrancer, any thing in this act contained to the contrary thereof in anywise notwithstanding.

This statute extends to mortgages where the principal is payable by instalments, *Hart v. Hosier*, 12 G. 1. And see *Bac. Ab. Mortgage*, E. 7; 1 *Wils.* 80; 8 *T.R.* 326, 410; 3 *Bos. & P.* 107; and other cases in *Chitty's Col. Stat.* 731, in notes.

(a) 7 *Geo.* 2, c. 20; *Anonymous*, 2 *Chitty's Rep.* 264; *Berthem v. Street*, 8 *T. R.* 326, 410; *Skinner v. Stacey*, 1 *Wils.* 80. And see other cases, *Tidd*, 1235, 1236.

(b) 7 *G.* 2, c. 20. And see cases *Chitty's*

Col. Stat. tit. Mortgage.

(c) *Ibid.*; 7 *Ves.* 489; 9 *Ves.* 36; *Goodtitle v. Bishop*, 1 *Young & J.* 344. But see *Goodtitle v. Pope*, 7 *T. R.* 185; and see cases *Chitty's Col. Stat.* 732, in notes.

to cases where the right to redeem is clear beyond all doubt; (d) but the Court of King's Bench, in construing this act and another statute containing a clause somewhat similar, fully investigated the grounds of opposition, saying that a mere colourable objection would not preclude the Court from affording relief, and adopted the same rule of construction of this very act in favour of a mortgagor. (e) If, however, it should appear in answer to the application that the mortgagor has legally and for adequate consideration agreed to convey his equity of redemption to the mortgagee, then the Court of Law will not in general interfere. (f)

The 4 Ann. c. 16, s. 20, as to *bail bonds*, and the 19 Geo. 2, c. 19, s. 23, as to replevin bonds, after authorizing the assignment of each from the sheriff and the assignee to sue in his own name, nearly in the same terms enable the Court in which the action thereon has been brought (and which must always be in the Court in which the process in the original action was returnable,) whether King's Bench, Common Pleas, or Exchequer, by *rule of Court*, and consequently on affidavit and rule nisi, "to give such relief to the parties upon the bond as is agreeable to justice and reason, and that such rule shall have the nature and effect of a defeazance to such bond." (g)

Bail-bonds and
replevin-bonds.

This Court (as well as Common Pleas and Exchequer) has an exclusive summary jurisdiction (as well of an equitable as of a legal nature (h)) over a *warrant of attorney*, authorizing a judgment in the particular Court, and all proceedings thereon, to entertain a motion to set the same aside if it authorize a judgment in that particular Court; and it has been usual to frame that security under seal, enabling certain attornies therein named, or any other attorney of a *particular Court*, to *appear in that Court* as attorney for the party, and to receive a declaration in an action, usually of debt, for a named sum at the suit of the creditor, and to confess such action, or suffer

Warrants of
Attorney.

(d) Per Alexander, C. B.; *Goodtitle v. Bishop*, 1 Young & J. 344, and 1 Barnes, 121.

(e) MS.; and see *Rex v. Wrottesley*, 1 Bar. & Adol. 648, to shew that a mere colourable claim ought not to prevent the Court from affording summary relief.

(f) *Goodtitle v. Pope*, 7 T. R. 185.

(g) See the practice as to the relief on bail-bonds, Tidd, 298 to 305, and post; and as to replevin-bonds, Chitty's Col. Stat. tit. Landlord and Tenant, 676, in notes. The words of 4 Ann. c. 16, s. 20, are, "And the Court where the action is brought may by rule or rules of the same Court give such relief to the plaintiff and defendant in the original action, and to

the bail upon the said bond or other security taken from such bail, as is agreeable to justice and reason; and that such rule or rules of the said Court shall have the nature and effect of a defeazance to such bail-bond or other security for bail." The terms of 11 G. 2, c. 19, s. 23, are, "And the Court where such action shall be brought may by a rule of the same Court give such relief to the parties upon such bond as may be agreeable to justice and reason; and such rule shall have the effect of a defeazance to such bond."

(h) *Martin v. Martin*, 5 B. & Adol. 934; *Harrod v. Benton*, 8 B. & Cres. 217, not there cited.

CHAP. V.
SECT. III.

judgment by nil dicit or otherwise, to be entered up against the party, and also authorizing such attornies respectively to release any errors in the proceeding. Though not usual, it would be advisable to frame every warrant of attorney, to authorize a judgment or judgments in an action *or actions* in *either* of the Courts at Westminster, so as to afford the creditor the option of afterwards proceeding in which Court he might please. How or when this peculiar security for a debt, authorizing a creditor as it were, *per saltum*, to sign a judgment and issue execution, without even issuing a writ, (i) was first invented does not appear, but it has now become one of the most usual collateral securities on loans of money, or contracts to pay an annuity, and for debts, but usually accompanied with some other deed or security.

With respect to *form*, by particular rules of each of the Courts, (k) every person preparing a warrant of attorney, to be subject to a defeazance, ought to cause such defeazance to be written on the same instrument, or at least a memorandum of the substance, (k) but the defect only subjects the attorney to a motion, and does not vitiate the instrument. (l) It need not in strictness be under seal, though usually so, in order to authorize the release of errors. (m) It is further regulated by statute 3 G. 4, c. 39, for preventing frauds *upon creditors* by secret warrants of attorney, and requiring all such warrants, with affidavits of the time of executing the same, to be filed within twenty-one days after they have been executed, or the same are to be void against the assignees in case of bankruptcy; and by sect. 3, if the instrument is to be subject to a defeazance, the latter *ought* to be written on the same paper, or the instrument will be void; (n) but the decisions establish that, notwithstanding the express terms in the enactment, it is merely void as to *creditors*, and is not so as against the party himself. (o) The statute 6 G. 4, c. 16, s. 81 and 108, as to bankrupts, prevents any preference from being obtained by an execution founded on a warrant of attorney, unless the goods

(i) *Reeves v. Slater*, 7 B. & C. 486; *Baddeley v. Shafto*, 8 Taunt. 434.

As there has been no previous writ, it was therefore held that a warrant of attorney is not a *suit* within the meaning of 1 W. 4, c. 70; *Williams v. Williams*, 1 Crompt. & J. 387; and see *Jones v. Clark*, *ibid.* 447.

(k) R. M. 42 G. 3, K. B.; R. M. 43 G. 3, C. P.; R. M. 43 G. 3, Exc.

(l) *Shaw v. Evans*, 14 East, 576; *Partridge v. Fraser*, 7 Taunt. 307; *Tidd*, 546; *Bennett v. Daniel*, 10 B. & C. 500.

(m) *Kinnersley v. Mussen*, 5 Taunt. 264; *Brutton v. Burton*, 1 Chit. R. 707.

(n) *Dillon v. Edwards*, 2 Moore & P. 550.

(o) *Bennett v. Daniel*, 10 B. & C. 500, but Parke, J. *dissentiente*; *Aireton v. Davis*, 9 Bing. 740. So although the rule M. 42 G. 3 requires every attorney to write the defeazance on the instrument, his omission does not invalidate the instrument; *Shaw v. Evans*, 14 East, 576; *Partridge v. Fraser*, 7 Taunt. 307; *Simson v. Goode*, 2 B. & Ald. 568.

be seized upwards of two months before the commission or fiat; (p) and the 7 G. 4, c. 57, s. 32, 33, extends the like provisions to warrants of attorney executed by a person who becomes an insolvent debtor; (q) and since these acts, it is in general advisable to require the sheriff to assign goods under a fieri facias immediately after the seizure.

With respect to the form of warrants of attorney and cognovits, when executed by a *prisoner in custody on mesne process*, the *general* rule of Hilary term, 1832, pl. 72, in order to protect such a prisoner from imposition, either as to the amount of the debt or costs, or the summary nature of the security, requires "the presence of an attorney on behalf of the prisoner, *expressly named by him, and attending at his request*, to inform him of the nature and effect of the instrument before he executes it, and *which attorney is to subscribe his name as a witness, and declare himself to be attorney for the defendant, and state that he subscribes as such attorney.*" This rule of all the Courts in effect supersedes the prior distinct rules of each Court, which were nearly to the same effect. (r)

With respect to the time of signing judgment, the *general rule* for all the Courts of Hilary term, 1832, requires leave to enter up judgment on a warrant of attorney, above one and under ten years old, to be obtained by a motion in term, or by order of a judge in vacation; and if ten years old or more, then upon a rule to shew cause. (s)

As the nature of this security enables the creditor to sign judgment and issue execution *per saltum*, without affording the debtor any opportunity of pleading illegality or other objection, the Courts of King's Bench and Common Pleas, although varying in some respects in their practice on the subject, have always considered it necessary to control the security, by interfering on affidavit and motion to set it aside; and if the objection appear clear and unanswered, will set aside the

(p) But if the fiat be not issued within two months after the seizure, the execution is effectual; *Godson v. Sanctuary*, 4 B. & Adol. 255; 1 Nev. & Man. 52. S. C.

(q) *Sharpe v. Thomas*, 6 Bing. 416; *Cuming v. Welsford*, *ibid.* 502.

(r) R. E. 15 Car. 2, reg. 2, K. B.; R. H. 14 and 15 Car. 2, reg. 4, C. P.; R. E. 4 G. 2, K. B.; R. T. 14 and 15 G. 2, C. P.; see decisions on those rules, Tidd, 548 to 550. When executed by a prisoner, care must be observed that the attestation complies with the above rule, as thus, "Signed, sealed, and delivered by the said C. D. in the presence of me G. H., being an attorney of the Court of King's Bench, expressly named and re-

quested by the said C. D. to attend as his attorney at the execution hereof, and to witness his execution hereof as his attorney, and I having before the said C. D. executed the same, duly informed the said C. D. of the nature and effect of this instrument, and I subscribe this attestation as such attorney, and for the said C. D., and at his request, in pursuance of the rule of Court in that behalf." This rule is construed strictly, *Fisher v. Papanicholas*, 2 Crompt. & M. 215.

(s) See the antecedent and present practice and rules of Court still in force in Common Pleas and Exchequer, Tidd, 552 to 555.

CHAP. V.
SECT. III.

warrant of attorney, and all proceedings thereon; or if the facts be doubtful, they will either refer them to the master, who may receive further affidavits, or the Court will direct an issue, so that the truth may be tried by a jury; (t) and where the affidavits in support of and against a motion to set aside a judgment and execution on a warrant of attorney were very contradictory, on the question of fact, whether the defendant had executed that instrument, the Court of King's Bench directed an issue to try the fact. (u) Where a warrant of attorney was given to enter up judgment only in the Common Pleas, and judgment had by mistake been entered up in King's Bench, the latter Court set aside the *judgment*, but held that they had no jurisdiction to order the warrant of attorney to be vacated. (v) Motions to set aside this security form a considerable part of the business of this Court. In setting aside a warrant of attorney, the Court of Law combines the jurisdiction of a Court of Equity as well as of a Court of Law, so as to have power to interfere even on mere equitable grounds. And such an application may be made not only by the defendant who executed it, or his representatives, but also by a creditor or landlord, or other third party prejudiced by it. (x) And therefore where A. being indebted for rent to her landlord, the latter proposed to C., her son-in-law, to take his promissory note as security, and C. said he would give an answer in a week or ten days, and the landlord then asked him whether A. owed him any thing, and he replied that she did not, or what she did owe he considered as a gift, and within the ten days A. executed a warrant of attorney to C. upon which judgment was entered up, execution issued, and C. took possession of the goods: the Court, considering the representations and conduct of C. to have been intended to defraud the landlord, set aside the warrant of attorney at his instance. (x) The Court of Exchequer in one case refused to entertain a summary application to set aside a warrant of attorney on the ground of alleged illegality, considering that the application for such should be to the *equity side* of that Court, (y) but probably a different doctrine would now be entertained. (y)

A warrant of attorney authorizing a judgment to be entered in the Court of Common Pleas, seems in some respects a preferable security to a creditor than a warrant of attorney autho-

(t) *George v. Stanley*, 4 Taunt. 683.

(u) *Gurney v. Langlands*, 5 B. & Ald.

330.

(v) 6 East, 241 a; Tidd, 9th edit. 521.

(x) *Martin v. Martin*, 3 B. & Adol.

934; *Harrod v. Benton*, 8 B. & C. 217, not there cited.

(y) *Matthews v. Lewis*, 1 Anst. 7; 2 Man. Exch. Pr. 500, note (c); but a quære is added, and see post.

rizing a judgment in King's Bench, because in Common Pleas the Court will not interfere to set it aside on the ground of usury, &c. excepting upon just terms, viz. of paying the principal sum and legal interest actually due. (z) But the Court of King's Bench will, without imposing any terms, cancel a warrant of attorney, and set aside a judgment and execution thereon, upon the ground of usury, fraud, or other illegality, unless the party signing the warrant of attorney induced a third person to purchase the debt by representing it was legal or justly due. (a) If a creditor hold other securities besides a warrant of attorney, and apprehend that if he proceed on the latter the debtor will move to set it aside under pretence of usury or other illegality, and swear so strongly as to induce the Court to refer the matter to the master, and endanger the result, then it may be more advisable to bring an action on the covenant contained in the other security, because the defendant will not then be enabled to avail himself of his own oath or evidence, and a jury may not credit the defence; or if the defendant should suffer judgment by default, the Court would not afterwards interfere; so if the debtor's bankruptcy or discharge under the Insolvent Act be apprehended, then an adverse judgment in an action would be preferable to a judgment on a warrant of attorney, since the statutes 3 G. 4, c. 39, 6 G. 4, c. 16, s. 108, 1 W. 4, c. 38, as to bankrupts; and 7 G. 4, c. 57, s. 33, as to insolvents.

Each of the superior Courts, although it may not in other respects have any criminal jurisdiction, has a summary jurisdiction over all its own immediate officers, in compelling them to return excess of fees, or attaching them for any official misconduct; (b) and also over sheriffs, who are considered officers of the Court; (c) and by express statute, the Courts or a judge may, on petition, summarily by order punish gaolers, bailiffs, and others, employed in the execution of process, and who may have been guilty of extortion or other abuse in their office or place, and compel them to make reparation to the party in-

Officers of the
Court, sheriffs,
bailiffs, &c.

(z) *Semble*, Tidd, 9th edit. 547; *Hindle v. O'Brien*, 1 Taunt. 413; *Brown v. Holt*, 4 Taunt. 587; *Coke v. Brummell*, 8 Taunt. 439, in C. P. But in *Parsons v. Hinthorn*, C. P. 21 December, 1829, Tindal, C. J. seems to think such practice in C. P. incorrect; *Roberts v. Goff*, 4 B. & Ald. 92, K. B.; Archbold, by T. Chitty, vol. ii. 496, note (c). It should seem that the practice in K. B. is the most sound, and that neither a Court of Law nor Equity ought to impose

terms when an act of parliament declares that a security *shall be void* on account of usury, &c. See *Barnard v. Young*, 17 Ves. 44.

(a) *Davison v. Franklin*, 1 B. & Adol. 142.

(b) Tidd, 57, 58; *Martin v. Bold*, 7 Taunt. 182; 2 Marsh. 487; *S. C. Sparrow v. Cooper*, 2 Bl. R. 1314; *Pater v. Croome*, 7 T. R. 336; *Wortley v. Palter*, 5 Taunt. 180.

(c) Tidd, 58.

CHAP. V.
SECT. III.

Attornies and
articled clerks.

jured, and the costs of the complaint ; (d) and where a sheriff's officer, on arresting a party, received from him a larger sum than he was liable to pay as a caption fee, the Court of Exchequer on motion referred it to the master to ascertain the proper fee, and ordered the officer to restore the surplus, and pay the costs of the application, (e) although the party might have sustained an action at common law for the excess, or have sued for the penalty incurred by the extortion. (e)

By ancient *statutes* ignorant and unskilful attornies may be punished and prohibited from practising. (f) So an attorney, who is imprisoned, is prohibited from practising whilst in custody, and if he do, he may be struck off the roll. (g) And the 12 G. 1, c. 29, s. 4, enacts, that if any person, who has been convicted of forgery or perjury, or subornation of perjury or common barretry, shall act or practise as an attorney or solicitor, or agent in any suit or action in any Court of law or equity in England, the judge or judges of that Court shall upon complaint or information thereof examine the matter *in a summary way in open Court*, and if the offence be established to the satisfaction of the judge or Court, he or they shall cause the offender to be transported for seven years as a felon. (h) So if an attorney practise for the profit of an unqualified person, he may be struck off the roll, and the unqualified person may be imprisoned for a year. (i) But the attorney may, after a time, on petition and satisfactory affidavit, be admitted, notwithstanding the strong terms of the act, that he shall be *for ever* afterwards disabled from practising as an attorney or solicitor. (k)

But independently of these and numerous other express regulations and penalties to which attornies and solicitors are subject, each of the Courts has summary jurisdiction over attornies of their own Court, when guilty of professional misconduct, (l) and this, although the malpractice was in an inferior

(d) 32 G. 2, c. 28, s. 11 ; and see *Ex parte Evans*, 2 Bos. & Pul. 88, as to the Court in which the application under this act must be made.

(e) *Watson v. Edmonds*, 4 Price, 309.

(f) Over ignorant and dishonourable attornies, 4 H. 4, c. 18; 32 H. 8, c. 30, s. 2; 3 J. 1, c. 7; 12 G. 1, c. 29; 2 G. 2, c. 23.

(g) 12 G. 2, c. 13, s. 9, against an attorney practising whilst a prisoner. *Whetham v. Needham and another*, Barnes, 44.

(h) This is one of the strongest instances of summary criminal jurisdiction that has ever been enacted.

(i) 22 G. 2, c. 46, s. 11; *In re Jackson and another*, 1 B. & C. 270; 3 Dowl. & R. 260, S. C.; *In re Garbatt*, 2 Bing.

74; 9 Moore, 157, S. C.; *Williams v. Jones*, 5 B. & C. 108; *Ex parte Whatton*, 5 B. & Ald. 824. *In the matter of Squire*, *infra*, n. (k).

(k) *R. v. Greenwood*, 1 Sir W. Blac. 222; but see *Ex parte Frost*, 1 Chitty's Rep. 558. However, in Easter term, 1830, Mr. Squire, who had been struck off the roll under this clause, for permitting an uncertificated conveyancer to serve process in the country for remuneration, was, on petition signed by very numerous practitioners and an affidavit, readmitted; and see *Ex parte Yates*, 9 Bing. 455.

(l) See in general *ante*, p. 33; Tidd, 87 to 90, 478; and 1 T. Chitty's Archbold, 40, 41; Archbold's Prac. C. P. edit. 1834, tit. Attornies, 16 to 24.

Court, as in the County Court. (m) Nor is it necessary that the misconduct should have been in the course of any suit; and it seems to be a general rule that when the employment of an attorney is so connected with his professional character, as to afford a presumption that he was employed in consequence of that character, the Court will interfere in a summary way to compel him to perform his duty, at least in accounting for and paying monies received by him for the use of the client; (n) and where an attorney in England had for many years acted as the agent of persons abroad, but for whom precisely, in consequence of several changes of parties by death, it did not appear, and he had received from the Prize Court in England large sums, without paying or accounting, this Court, upon affidavit and motion, referred the rule to Mr. Justice Bayley, who compelled the attorney to pay over the balance in hand, on receiving an adequate indemnity against supposed claims to be approved by the Master, although it was insisted that as the attorney had issued no process, and had acted only as agent, and not in any respect as an attorney of this Court, and as the real claimant was doubtful, the Court had no summary jurisdiction over him. (o) In a late case, where an attorney had received money to the use of his client, and not accounted for it, and had afterwards become bankrupt and obtained his certificate, the Court refused on motion to order him to repay the money so received, because the account was a debt barred by the certificate; (p) but declared that if the attorney had committed *fraud* in the receiving and not accounting, then the Court, in the exercise of its general jurisdiction over its officers, would have enforced such payment as a modification of the punishment, which it might otherwise inflict for his misconduct. But they considered that to deprive the attorney of the benefit of his certificate under the fiat against him, the case of *fraud* ought to be clear, and that the attorney should have notice, by the form of the rule, that the application was of a penal nature, and that it was not enough merely to require him by the rule to shew cause why he should not pay over the money. (p) If an attorney in that character, and with reference to a suit depending in Court, give an undertaking in writing to appear, or an undertaking to pay the debt and costs, as "I, the undersigned, agree to pay the debt and costs in this action, 16th July, 1830. John Green." the Court, of which he is an attorney, will on a summary application compel him to per-

(m) *Evans v. —*, 2 Wils. 382; 1 Bing. 91, S. C.
In re Farmer, 3 Dowl. & R. 602. (o) *In re Woolf*, 2 Chitty's Rep. 68.
 (n) *In re Executors of Aitkin*, 4 B. & (p) *In re Bonner*, Gent. one, &c. 4 B.
 Ald. 47; *Ex parte Hall*, 7 Moore, 437; & Adol. 811.

CHAP. V.
SECT. III.

form it, although it were void by the statute against frauds, for not stating the consideration, in respect of which it was signed; (q) but it is the safest course *to apply to the Court* in which the attorney has been admitted, although the undertaking refer to a suit depending in another Court; (r) and it is obvious that an action for nonperformance of the undertaking would fail, and a summary application is the only course; though in cases *merely of negligence*, and not of want of integrity, the Court will not interfere summarily, and will leave the party complaining to his action. (s) We have seen that a Court of Equity will by injunction prevent an attorney from being concerned or acting against his former client, in a matter where his previous employment for the client afforded him important information, which he might subsequently use materially against such client, (t) and a Court of Law appears to possess the like jurisdiction, though it will not be exercised, unless it be shewn that there is strong ground to expect that the attorney will abuse the confidence formerly reposed in him. (u) It was held recently (A.D. 1832) in the Exchequer, that the Courts have at common law an inherent jurisdiction independently of 2 G. 2, c. 23, s. 23, to tax the bills of attornies practising therein, and therefore may refer to taxation, without imposing the terms of undertaking to pay; (x) but in the last case in King's Bench (A.D. 1833) the contrary was decided. (y) All the Courts exercise summary jurisdiction over questions between attornies and their articted clerks, in compelling a return of a part of the premium and otherwise. (z)

Imperative judgment by default in proceedings for costs of election petitions by 9 G. 4, c. 22.

Whilst noticing these principal instances of summary jurisdiction given by particular statutes, it may be proper to notice an instance, somewhat of summary and peculiar jurisdiction, connected with the practice of elections. The 9 G. 4, c. 22, s. 57 & 63, contains enactments under which costs incurred by opposing a petition against the return of a member of parliament, may be recovered against any one of several persons, who have signed it; and the act declares that the certificate

(q) *Evans v. Duncombe*; and *In re Greaves*, 1 Crompt. 372 to 376; and see *Hall v. Ashurst*, 3 Tyr. 420.

(r) *Ibid.*; and *In re Greaves*, 1 Crompt. & J. 374, note (a).

(s) *Ante*, 33; Tidd, 86; *Beal v. Langstaff*, 2 Wils. 371; *In re Laurence*, 2 Moore, 665; *Short v. Pratt*, 7 Moore, 424; 1 Bing. 102, S. C.; *Ex parte Brooks*, 1 Bing. 105; *Pitt v. Yalden*, 4 Burr. 2060; *In re Jones*, 1 Chitty's Rep. 651, 652; *R. v. Tew*, Sayer, 50; *R. v.*

Bennet, id. 169.

(t) *Ante*, vol. i. 705, 706, 714.

(u) *Grissell v. Peto*, 9 Bing. 1; *Johnson v. Marriott*, 2 Crompt. & J. 183.

(x) *Watson v. Postaw*, 2 Tyrw. 406.

(y) *Clutterbuck v. Combes*, 5 B. & Adolp. 460; see post, Chancery.

(z) Tidd, 68; 1 Archb. K. B. by T. Chitty, 16; *Ex parte Bayley*, 9 B. & C. 691; 2 Barnardiston's R. 227, 231; *Ex parte Promkind*, 3 B. & Ald. 357; 1 Chit. R. 694.

of the Speaker of the House of Commons as to the amount of costs, shall be conclusive evidence of the amount of the claim for costs, and shall have the force and effect of a warrant of attorney to confess judgment, and the superior Courts at Westminster, or rather that in which the action for the costs shall be commenced, shall give effect to the certificate accordingly. This very singular enactment certainly affords a more summary proceeding for such costs than by the intervention of a jury, as at common law. (z)

At common law the Courts of law would in general in a degree protect *their own officers*, when acting bona fide in executing the process of the Court, (as a sheriff acting in obedience to a writ of fieri facias,) from the risk of double liability to two different claimants, as where he had seized goods under a writ of fieri facias, provided he applied to the Court as soon as he found himself in peril; as if upon such seizure he had notice that the party, whose goods he had taken, had committed an act of bankruptcy, and that assignees claimed the property, or there was a reasonable doubt whether the goods were not liable to an extent of the crown, the Court would enlarge the time for returning the writ, when ruled by the plaintiff to do so, until he or the assignees had indemnified him or had inter se settled their mutual claims, (b) and would compel the adverse claimant to try the right, whilst the proceeding against the sheriff or officer was suspended, or upon the terms of his bringing the proceeds into Court to abide the result. At common law this was the only mode of relief to the sheriff, who had seized goods in settlement, for he could not then file a bill of interpleader, because, as observed by Lord Eldon, "A person could not file a bill of interpleader, who was obliged to put his case upon this, that as to some of the parties he might be a wrongdoer, as by the seizure and temporary detention of the goods;" (c) for the same reason the Court of King's Bench, on the motion of an *auctioneer*, who had, before notice of any third person's claim, sold under an execution by the direction of the sheriff, gave him leave to bring the proceeds into Court, with a stay of actions against him. (d) But when the sheriff

3dly, In furtherance of the Court's own jurisdiction and of the extension of jurisdiction of the Courts of law by the *Interpleader Act*, 1 & 2 W. 4, c. 58, s. 6. (a)

Relief to sheriffs.

(z) See 9 G. 4, c. 22; and *Gurney v. Gordon*, 2 Tyr. 616.

(a) As to bills of interpleader in equity see Chit. Eq. Dig. Pleading, 780; Practice, 894, 1110; 1 Mad. Ch. Pr. 173 to 182; *post*, Chancery.

(b) See decisions at common law, *Wells v. Pickman*, 7 T. R. 174; *M'George v. Burch*, 4 Taunt. 585; *R. v. Briden*,

7 Taunt. 294; 1 Moore, 43; 2 Chit. R. 204, and other cases; Tidd, 620, note (q), 1017, 1018; *id.* Suppl. 183; 2 Arch. by T. Chitty, 759 to 761; but see *Hartley v. Stead*, 8 Moore, 466; *Saunders v. Sheriff of Middlesex*, 3 B. & Ald. 95; *Etchells v. Lovatt*, 9 Price, 54.

(c) *Slingsby v. Boulton*, 1 Ves. & B. 334. (d) MS.

CHAP. V.
SECT. III.

of Hertfordshire by his under-sheriff hastily returned on writs of fieri facias, that he had seized goods, and they remained on hand for want of buyers, the Court of King's Bench refused leave to amend his return on affidavit that writs of extent had since been received for sums exceeding the value of such goods, because he ought to have made more diligent inquiry before he returned the writ. (e) This interference at *common law* was improved and extended by 1 & 2 W. 4, c. 58, s. 6, which, after reciting that difficulties sometimes arise in the execution of process against goods and chattels issued by or under the authority of the said Courts, by reason of *claims* made to such goods and chattels by *assignees of bankrupts*, and *other persons*, not being the parties against whom such process had issued, whereby *sheriffs* and *other officers* are exposed to the hazard and expense of actions, and it is reasonable to afford relief and protection *in such cases* to such sheriffs and other officers, therefore enacts, "That when *any such claim* shall be made to any goods or chattels taken or intended to be taken in execution, under any such process, or to the proceeds or value thereof, it shall and may be lawful to and for the Court, from which such process issued, upon application of *such sheriff or other officer*, made before or after the return of such process, and as well before as after any action brought against such sheriff or other officer, to call before them by rule of Court as well the party issuing such process as the party *making such claim*, (f) and thereupon to exercise for the adjustment of such claims, and the relief and protection of the sheriff or other officer, all or any of the powers and authorities *hereinbefore contained*, (g) and make such rules and decisions as shall appear to be just, according to the circumstances of the case, and the *costs* of all such proceedings shall be in the discretion of the Court." If the sheriff have accepted the indemnity of a third person, (h) or has paid over the proceeds to the judgment creditor, (i) he will not be relieved under this act. And the application must be at the first opportunity, and the affidavit positively deny collusion. (k) Where in consequence of a claim by assignees to goods taken by a sheriff under a fi. fa., the latter applied to

(e) MS. A. D. 1818; but see *Rutson v. Hatfield*, 3 B. & Ald. 204, *contra*; and see *Anderson v. Calloway*, 1 Crompt. & M. 182; *Cook v. Allen*, *id.* 542.

(f) *Semble*, that this act extends to every claim, whether at law or in equity, and renders doubtful the accuracy of *Sturges v. Claude*, 1 Dowl. Rep. 505.

(g) Refers to sections 1, 2, 3, 4, 5,

which see *infra*.

(h) *Tucker v. Morris*, 1 Crompt. & M. 73.

(i) *Anderson v. Calloway*, 1 Crompt. & M. 182; 3 Tyrw. Rep. 237, S. C., by name of *Chalon v. Anderson*; and see *Saunders v. Sheriff of Middlesex*, 3 B. & Ald. 95.

(k) *Cook v. Allen*, 1 Crompt. & M. 542.

the Court and obtained relief according to this act, it appears to have been considered that the Court could not allow the sheriff the costs of necessary possession, but merely suffered him to withdraw from the possession in case the plaintiff in the execution did not appear to the rule. (l) But when a sheriff had taken goods in execution, and on an adverse claim being made to them, obtained a rule under the 6th section of this act, to which the claimant did not appear, the Court barred the claim and ordered the party, who had made such claim, and thus abandoned the same, to pay the execution creditor his costs of shewing cause against the rule, unless cause should be shewn by the claimant in six days from service of such order; (m) but no costs were allowed to the sheriff, which is a hardship, requiring relief. (n) In a late case where goods had been taken by the sheriff under a fi. fa. and sold by him, and another fi. fa. having been issued in the mean time against the same goods, and another party claimed title to the property against the defendant and the sheriff, and complained that the goods had been sold improvidently and in spite of notice from such claimant, the Court of King's Bench made an order under the act, protecting the sheriff from such multiplied liability upon proper terms. (n)

Excepting in the case of a *sheriff* and of a seizure under process, a person sued for a debt or for goods, and being a stockholder, bailee, or agent, although he claimed no interest or benefit in the subject in dispute, could not have any relief at law, and was obliged to file a bill of interpleader in a Court of Equity at great trouble and expense. (o) The statute 1 & 2 W. 4, c. 58, remedies, to a certain extent, this evil, and whilst it makes considerable inroad on the prior exclusive jurisdiction of a Court of Equity, greatly enlarges the jurisdiction of all the Courts of Law at Westminster, and of the Common Pleas at Lancaster, and Court of Pleas at Durham. The first section, after reciting that it often happens that a person sued at law for the recovery of *money or goods*, (p) wherein he has no interest, and which are also *claimed of him by some third party*,

Relief at law in other cases under the interpleader act, 1 & 2 W. 4, c. 58.

(l) *Field v. Cope*, 2 Tyr. Rep. 458.

(m) *Perkins v. Benlow*, 3 Tyr. Rep. 51. This decision appears to be analogous to the practice in equity on an interpleader bill of making the unsuccessful claimant pay the costs his false claim occasioned.

(n) *Slowman v. Bach*, 3 B. & Adol. 103.

(o) 7 Term R. 174; Smith's Ch. Pr. 351 to 358; 1 Madd. Ch. Pr. 173 to 182;

Chit. Eq. Dig. Prac. XIV., Bill of Interpleader, 894, 1110, and *post*.

(p) This recital shews that it was the intent of the legislature to confine the remedies given by the act to *money demands and claims on goods*; but, as observed in 2 Dowl. Stat. 570, there seems to be no reason why the act does not extend to *trespass for goods* or to *covenant for rent, &c.*

CHAP. V.
SECT. III.

has no means of relieving himself from such adverse claim but by a suit in equity against the plaintiff and such *third party*, usually called a *Bill of Interpleader*, which is attended with expense and delay ; for remedy thereof enacts, that upon application, made by or on behalf of any defendant, sued in any of his Majesty's Courts of Law at Westminster, or in the Court of Common Pleas in the County Palatine of Lancaster, or the Court of Pleas of the County Palatine of Durham, *in any action of assumpsit, debt, detinue, or trover*, such application being made *after declaration and before plea*, by *affidavit* or otherwise, shewing that such defendant does not claim any interest in the subject matter of the suit, but that the right thereto is claimed or supposed to belong to some third party who *has sued or is expected to sue* for the same, and that such defendant *does not* in any manner *collude* with such third party, but is ready to bring into Court or to pay or dispose of the subject matter of the action in such manner as the Court (or any judge thereof) may order or direct, it shall be lawful for the Court, or any judge thereof, to make rules and orders calling upon *such third party* to appear and to state the nature and particulars of his claim, and maintain or relinquish his claim, and upon such rule or order to hear the allegations as well of *such third party as of the plaintiff*, and in the meantime to *stay the proceedings* in such action, and finally to order such third party to make himself defendant in the same or some other action, or to proceed to trial on one or more *feigned issue or issues*, (q) and also to direct which of the parties shall be plaintiff or defendant on such trial, or, with the consent of the plaintiff and such third party, their counsel or attornies, to dispose of the merits of their claims and determine the same in a summary manner, and to make such other rules and orders therein as to *costs* (r) and all other matters as may appear to be just and reasonable. (s)

(q) See an instance of such feigned issue, *Dixon v. Yates*, 5 B. & Adolp. 313.

(r) In equity, the plaintiff in a bill of interpleader properly filed is entitled to costs out of the fund, *Campbell v. Solomons*, 1 Sim. & Stu. 462; and *semble*,

the practice is the same under this section, though the party ultimately unsuccessful must repay the amount, *Ducar v. Mackintosh*, 3 Moore & S. 174; *Cotter v. Bank of England*, *id.* 180.

(s) The act also contains the following sections :—Sect. 2 enacts, that the judgment in any such action or issue as may be directed by the Court or judge, and the decision of the Court or judge in a summary manner, shall be final and conclusive against the parties and all persons claiming by, from, or under them. Sect. 3 enacts, that if such third party shall not appear upon such rule or order, to maintain or relinquish his claim, being duly served therewith, or shall neglect or refuse to comply with any rule or order to be made after appearance, it shall be lawful for the Court or judge to declare such third party, and all persons claiming by, from, or under him, to be for ever barred from prosecuting his claim against the original defendant, his executors, or administrators, saving nevertheless the right or claim of such third party against the plaintiff,

As the proceedings under this statute, as well in relief of sheriffs as of other persons, are in many respects analogous to and in lieu of the remedy in equity by a bill of interpleader, it will frequently, at least in doubtful cases, be expedient to examine the practice and decisions in Courts of Equity upon such a bill. (t) It has been supposed that this act does not extend to equitable claims, but the relief is not in terms restrained to legal claims. (u) The act does not take away the right of a party to file a bill of interpleader, for the remedy is merely concurrent; though if a sheriff or stakeholder have filed such a bill, then, having made his election, the Common Law Courts will not interfere. (u) A party who has paid over the proceeds to the execution creditor, (x) or has so connected himself with one of the claimants as to accept his indemnity, will not be relieved under this act; (y) nor will the Court always interfere in favour of a person who has unnecessarily and officiously subjected himself to the double risk; (z) and with analogy to the practice in equity on bills of interpleader, a party who still in-

and thereupon to make such order between such defendant and the plaintiff, as to costs and other matters, as may appear just and reasonable. Sect. 4 provides, that no order shall be made, in pursuance of this act, by a single judge of the Court of Pleas of the said County Palatine of Durham who shall not also be a judge of one of the said Courts at Westminster, and that every order to be made in pursuance of this act by a single judge not sitting in open court shall be liable to be rescinded or altered by the Court, in like manner as other orders made by a single judge. Sect. 5 provides also, that if upon application to a judge in the first instance, or in any later stage of the proceedings, he shall think the matter more fit for the decision of the Court, it shall be lawful for him to refer the matter to the Court, and thereupon the Court shall and may hear and dispose of the same in the same manner as if the proceeding had originally commenced by rule of Court instead of the order of a judge. Sect. 7 enacts, that all rules, orders, matters, and decisions to be made and done in pursuance of this act, except only the affidavits to be filed, may, together with the declaration in the cause, (if any) be entered of record, with a note in the margin expressing the true date of such entry, to the end that the same may be evidence in future times, if required, and to secure and enforce the payment of costs directed by any such rule or order, and every such rule or order so entered shall have the force and effect of a judgment (except only as to becoming a charge on any lands, tenements, or hereditaments,) and in case any costs shall not be paid within fifteen days after notice of the taxation and amount thereof given to the party ordered to pay the same, his agent, or attorney, execution may issue for the same by fieri facias or capias ad satisfaciendum adapted to the case, together with the costs of such entry and of the execution, if by fieri facias, and such writ and writs may bear teste on the day of issuing the same, whether in term or vacation, and the sheriff or other officer executing any such writ shall be entitled to the same fees, and no more, as upon any similar writ grounded upon a judgment of the Court.

(t) See in general Chit. Eq. Dig. Pleading, 780 *id.* tit. Practice, 894, 1110; 1 Madd. Ch. Pr. 173 to 182, and *post*, Chancery.

(u) *Sturgess v. Claude*, 1 Dowl. R. 505; Tidd. Supp. 190; but note the report of that case does not distinctly shew the ground of decision by the single judge; why ought not a sheriff to be protected at law, unless he has made his election by filing a bill of interpleader? In general a bill of interpleader is sustainable, though the demand of one claimant is of

a legal nature and the other of an alleged equitable right, *Morgan v. Morsack*, 2 Merivale's R. 111; 1 Madd. Ch. Pr. 173, 174. If so, the case in 1 Dowl. R. 505, as reported, is not correct; but see *Barclay v. Curtis*, 9 Price, 661.

(x) *Anderson v. Galloway*, 1 Crompt. & M. 182; 3 Tyr. R. 237, S. C.

(y) *Tucker v. Morris*, 1 Crompt. & M. 73; 1 Dowl. R. 639, S. C.

(z) *Belcher v. Smith*, 9 Bing, 82; 2 Moore & S. 184, S. C.

CHAP. V.
SECT. III.

sists on a lien, and therefore is himself a claimant. will not be relieved, (a) unless the lien were of such a nature that it must have been satisfied by the successful claimant, whichever party he might be, and the party applying for relief limited his claim to such lien. (b) Where goods consigned to A. were housed at the London Docks, and were claimed by B., and the dock company required an indemnity of A., the original consignee, before delivering them to him, and A. refused, and brought an action of trover with counts for special damage for the detention; on motion by the company for relief under the interpleader act, 1 & 2 W. 4, c. 58, B., upon due notice, not appearing, the Court held that the claim of B. against the company was barred, but that A. ought not to be precluded from recovering for his special damage, if any; (c) the rule therefore was that on the defendant's undertaking to deliver up the wine, then if A. should accept the same the action should be discontinued on payment of costs by the defendants; but if A. should go on with the action the count in trover should be struck out, and A. proceed for the special damage only. (c)

As the statute in express terms is limited to summary interference in actions of *assumpsit*, *debt*, *detinue* and *trover*, many cases will arise when the act will not apply, and when it will still be necessary to apply to a Court of Equity for relief. (d) Frequently a plaintiff has an election to proceed in an action of *trespass* or of *trover*, and if he wish to avoid a summary application under the interpleader act, he may do so by issuing his writ and declaring in *trespass*. So by declaring in *covenant* on a lease instead of *debt*, it would seem doubtful whether the Court could interfere under the terms of that act, and *case* and *replevin* are certainly not actions within the act.

Another modern improvement in the administration of justice in Courts of Law has been introduced in invasion of the previous exclusive jurisdiction of Courts of Equity, by the statute, 1 W. 4, c. 22, giving an absolute power to examine witnesses on interrogatories *without consent*. Before that act there was no power *at law* to *compel* consent to a commission or to the examination of witnesses upon interrogatories, (e) though the Court would put off the trial at the instance of the defendant,

Extension of jurisdiction of the superior Courts of Law by enabling them to issue commissions and to examine witnesses on interrogatories under 1 W. 4, c. 22.

(a) *Braddick v. Smith*, 9 Bing. 84; 2 Moore & S. 131, S. C. Same rule in equity, see *Mitchell v. Hayne*, 2 Sim. & Stu. 63.

(b) *Id. ibid.*; *Cotter v. Bank of England*, 3 Moore & S. 180; see the Practice Tidd, Sup. 1833, p. 162 to 315; Chapman's Addenda to his Practice, 162; 2 Arch. K. B. by Chitty, 758.

(c) *Lucas v. London Dock Company*, 4

B. & Adolp. 378.

(d) See *post*, Court of Chancery.

(e) Per Bolland, B. in *Bucket v. Williams*, 1 Tyrw. R. 504; 3 Bla. Com. 382, 383, 438, 449; Tidd, 485 (g), 810, note (h), (i), 811; Tidd's Supp. 158, cites 2 Rep. C. L. Comm. 23, 24, 73, &c.; 4 Taunt. 46; 2 Chitty's R. 179; Cowp. 174; 2 Dowl. Stat. 43, note (d).

if the plaintiff would not consent; (*f*) and if the defendant refused, the Court would not allow him to sign judgment as in case of a nonsuit. (*g*) The Court of Exchequer, however, would grant a commission to examine a witness who was in this country, on an affidavit of his being under the necessity of going abroad before the day of trial, although the cause were not at issue and the answer had not come in. (*h*) In cases where it was important to proceed to trial, and the opponent refused to consent to examine witnesses abroad, it was formerly absolutely necessary, excepting as above in the Exchequer, to proceed in a Court of *Equity*, in order to obtain a commission for the examination of such witnesses, and for which purpose it was necessary to institute a new suit by filing a bill praying a commission and that defendant should be decreed to consent as auxiliary to the suit at law. (*i*) But now by 1 & 2 W. 4, sess. 2, c. 22, all the superior Courts or a judge has an absolute power of ordering an examination of a witness upon interrogatories if within the jurisdiction of the Court, or of ordering a writ in the nature of a *mandamus* or *commission* for the examination of the witness if he be out of such jurisdiction.

The first section, after reciting that "whereas great difficulties and delays are often experienced, and sometimes a failure of justice takes place in actions depending in Courts of Law, by reason of *the want of a competent power and authority in the said Courts to order and enforce the examination of witnesses*, when the same may be required before the trial of a cause; and whereas by an act passed 13 G. 3, intituled An Act for the establishing certain Regulations for the better Management of the Affairs of the *East India Company*, as well in India as in Europe, certain powers are given and provisions made for the examination of witnesses in *India* in the cases therein mentioned, and it is expedient to extend such powers and provisions, therefore enacts, that all and every the powers, authorities, provisions and matters contained in the said recited act relating to the examination of witnesses in India, shall be and the same are hereby extended to all colonies, islands, plantations and places *under the dominion of his Majesty in foreign parts*, and to the judges of the several Courts *therein*, and to all actions depending in any of his Majesty's Courts of Law at Westminster, *in what place or country soever the cause of action may have arisen*, and whether the same may have arisen

(*f*) Cowp. 174; Doug. 419; 1 Bos. & Pul. 210.

(*g*) Tidd, 811.

(*h*) 1 Price, 449, 381.

(*i*) 2 Rep. C. L. Com. 234—73; 3

Bla. Com. 382, 383, 438, 449; Tidd, Sup. 158; 2 Mad. Ch. P. 405; see the cases as to bills for commissions to examine witnesses, Chit. Eq. Dig. Practice, p. 1017 to 1024.

CHAP. V.
SECT. III.

within the jurisdiction of the Court, to the judge whereof the writ or commission may be directed, or elsewhere, when it shall appear that the examination of witnesses under a writ or commission issued in pursuance of the authority hereby given, will be necessary or conducive to the due administration of justice in the matter wherein such writ shall be applied for. (*k*)

Although the 1st section of this act in terms seems only to authorize a commission to be executed in some place part of the British dominions, the 4th section is general, so that since this act a commission may issue to examine witnesses in *France or any other place* out of the common law jurisdiction of the Court, on motion in that Court of law in which the action shall be depending (*l*). The examination of witnesses on interrogatories, under this act, is discretionary, and the party *may* still be allowed the expenses of bringing over witnesses from abroad and maintaining them here, in order that they may be examined in Court *viva voce*. (*m*)

No compulsory discovery, except in summary proceedings; and of the ineffectual attempt to establish such compulsory power now exclusively exercised by Courts of Equity.

In the instances in which the Courts of Law permit summary application as against attornies, and in cases of awards, annuities, mortgages, bail bonds, replevin bonds and other cases before noticed; the proceeding of the applicant is by filing affidavits, on which he founds his motion, and obtains a rule nisi; and this proceeding in effect operates somewhat like a bill in equity

(*k*) It is clear from section 4, that this act (as did the 13 G. 3, c. 63, s. 45,) extends to applications as well by a *defendant* as of a *plaintiff*, *Grillard v. Hogue*, 1

Brod. & Bing. 519; 2 Dowl. Stat. 42, note (*a*). The act also contains the following sections:—

Sect. 2 enacts, That when any writ or commission shall issue under the authority of the said recited act, or of the power hereinbefore given by this act, the judge or judges to whom the same shall be directed, shall have the like power to compel and enforce the attendance and examination of witnesses as the Court whereof they are judges does or may possess for that purpose in suits or causes depending in such Court.

Sect. 3 enacts, That the costs of every writ or commission to be issued under the authority of the said recited act, or of the power hereinbefore given by this act in any action at law depending in either of the said Courts at Westminster and of the proceedings thereon, shall be in the discretion of the Court issuing the same.

Sect. 4 enacts, That it shall be lawful to and for *each of the said Courts at Westminster*, and also the Court of Common Pleas of the county palatine of Lancaster, and the Court of Pleas of the county palatine of Durham, and the several judges thereof, *in every action depending in such Court*, upon the application of *any of the parties* to such suit,* to order the examination on oath upon interrogatories or otherwise before the master or prothonotary of the said Court or other person or persons to be named in such order, of any witnesses within the jurisdiction of the Court where the action shall be depending, or to order a commission to issue for the examination of witnesses on oath at *any place or places out of such jurisdiction* by interrogatories or otherwise, and by the same or any subsequent order or orders to give all such directions touching the time, place and manner of such examination, as well within the jurisdiction of the Court wherein the action shall be depending as without, and all other matters and circumstances connected with such examination, as may appear reasonable and just.†

(*l*) *Duckett v. Williams*, 1 Tyrw. Rep. 502; and other cases cited; see further as to the practice, Tidd. Sup. A.D. 1833, p. 162 to 167; and 1 Archb. K. B. by

Chitty, 250; 1 Archb. C. P. [96], 150.

(*m*) *Macalpine v. Powles*, 3 Tyrw. R. 871.

* *Grillard v. Hogue*, 1 Brod. & Bing. 519.

† Then follow seven other sections relative to the proceedings.

praying a discovery, but with this difference, that in equity the party must make the required disclosure or be committed for his contempt; but at law the party shewing cause need not absolutely make an affidavit, but may decline to shew cause and let the rule be made absolute without discussion, or he may rely upon the affidavits of third parties. In general, however, if the affidavits of the applicant charge some particular transaction by or with the privity of the opponent, then unless he make affidavit denying such allegation, the matter will be taken *pro confesso* against him; so that in general a rule nisi at law operates as a bill of discovery, and compels him on his oath to state the facts at the peril of an indictment for perjury, if the applicant and another person can distinctly swear to the converse. Lord Wynford attempted to introduce an act containing clauses enabling Courts of Law to examine the parties themselves, whether plaintiff or defendant, relative to the right of action or defence; but the bill was thrown out as too strong a measure, tending to destroy the boundaries between legal and equitable jurisdiction. (n)

The foregoing, it will be observed, are proceedings *to extend* the jurisdiction of the King's Bench and other Courts of Law, by affording summary assistance in such Courts. But moreover the Court of King's Bench, and indeed equally so the other superior Courts of Law, claim and exercise a very useful and extensive legal and equitable jurisdiction over the proceedings in their own particular Court, so as to prevent their *misapplication*, (however correct and legal in themselves according to the general jurisdiction and practice of each Court,) or perversion or abuse, by which they might, if permitted, become the engines of malice and vexatious oppression or litigation. Thus, besides the proceeding by prohibition to prevent a suit in *another* Court that has no jurisdiction, if a plaintiff vexatiously institute two or more actions or proceedings at the same time and with the same object in different Courts, although one Court has no direct power to issue a prohibition or interfere with the proceeding in the other Court when the latter has jurisdiction, yet each Court can effect the same object, by granting a rule in the action depending in its own Court, calling on the plaintiff to shew cause why he shall not either abandon the action in the other Court, or submit to have the proceedings in this Court stayed; (o) which

Summary application to prevent the abuse of the authority of the Court or other vexatious proceeding.

(n) The consequence is, that just claims for *small debts* must be frequently abandoned, when it would not be worth the

expence of filing a bill of discovery.

(o) *Miles v. Bristol*, 3 B. & Adol. 945.

CHAP. V.
SECT. III.

proceeding saves the necessity for the expense, and risk of a *plea* that another action is pending for the same cause. But where an application was made to the Court of Common Pleas to stay proceedings in an action, on the ground that a former action for the same cause had been referred to an arbitrator by a rule of Court, and by which the plaintiff was precluded from bringing a new action, that Court refused the application. (o) We shall hereafter, when considering motions to stay proceedings, examine the summary jurisdiction of the Courts of Law to interfere in these and other cases, and what is the redress when the jurisdiction has been abused.

Civil jurisdiction in aid of the civil jurisdiction of other Courts, or in compelling them to act, or restraining them from acting, or from acting improperly, and on appeal from their decision.

This Court has extensive jurisdiction as well in *aid of other Courts* and jurisdictions, as in *compelling* them to act when they improperly refuse to do so, or in *restraining* them from acting when they have no jurisdiction, or exceed or abuse it, or in correcting their judgments or proceedings by *writ of error* or *false judgment*, or on *certiorari*.

Of the first description are the instances of this Court receiving and hearing arguments upon a *Case* stated by a Court of Equity, and certifying their opinion for the assistance of the judge of the Equity Court; or trying an issue directed by a Court of Equity, or by some act of parliament; or enforcing the judgment of an inferior Court by *certiorari*, and issuing execution from this Court; of the *second* description are the proceedings by *mandamus* to inferior Courts and officers of a public nature; of the *third*, are writs of *prohibition*; and of the last, are writs of error or *false judgment*, or removal of the proceedings by *certiorari*, and more summarily examining their sufficiency, or giving them effect.

Right of Courts of Equity to send a *case* to a Court of Law for opinion. (p)

The Court of Chancery, (q) the Master of the Rolls, and the Vice-Chancellor, (r) respectively have power to direct a *Case* with appropriate questions of *law* to be stated, and sent to one of the superior Courts of *Law* for the opinion of the judges; (s) and which in substance is in the nature of a *Special Case* stated after a trial at law, or under the excellent recent provision

(o) *Dicas v. Jay*, 6 Bing. 519, *sed quere*; and see post as to staying proceedings.

(p) See in general 2 Madd. Chan. Pr. 474; *id.* 2d ed. 335; Newl. Chan. Pr. 181, 356; Chit. Eq. Dig. tit. Practice, L. iil. p. 1066 to 1073.

(q) *Wheeler v. Duke*, 3 Tyr. R. 61.

(r) *Wingfield v. Thorp*, 10 B. & C.

785.

(s) *Daintry v. Daintry*, 6 T. R. 313. But this is only when the case has been properly stated, *Parsons v. Parsons*, 5 Ves. 578; 1 Dougl. 344, n. And a case cannot be sent by the Committee of Appeals of the Privy Council for the opinion of the Courts of Law, *ibid.*

in the 3 & 4 W. 4, c. 42, s. 25. (t) The judges of the Court to which such case has been sent, after hearing counsel upon each side, respectively sign and return their certificate, concisely stating their joint opinion, but without assigning any reasons. (u) The opinion of the Court of Law may be thus obtained when the facts have already been found, or are admitted, without an issue or finding of a jury. (u) But this proceeding is merely for the information of the equity judge, and he is not bound by the opinion of the Court of Law. (x) Nor are Courts of Law bound to answer a speculative question, and, therefore, the case stated for their opinion must set forth the terms of the conveyance that may raise the question, not a mere speculative abstract question, (y) and the Court of K. B. declined to answer a case from the Rolls stated as a *trust*; (z) and more recently the Court of Exchequer declined to decide on a question arising on an issue directed to it out of Chancery, and which involved a right merely equitable, particularly where the rules of law and equity differ on the question. (a) Where there has been a reference to the judges on a case stated, no writ of error lies on their judgment; though if they certify their reasons, they may re-consider their decision. (b) In general if the Chancellor or other equity judge should be dissatisfied with the opinion of the Court of Law on a case thus stated, he may cause the same case to be sent to another Court of Law, there being but one instance of sending back a case for review to the *same* Court. (c) On a case sent from Chancery into C. P., the latter Court ought not to give an opinion on any other than the question put by the Chancellor. (d) From the equity side of the Court of Exchequer the stating a case for the opinion of the Court, of which the chief baron is the presiding judge at law as well as in equity, would be *ab eodem ad idem*, and, therefore, in a degree less useful. (e) In consequence of the pressure of business in the Court of King's Bench, it has of late been more usual to send the cases from equity to the Court of Common Pleas, or to the

(t) And yet before that enactment an attorney was fined for fabricating a case, though by consent, *In re Elsam*, 3 B. & C. 597.

(u) See the cases Chit. Eq. Dig. tit. Practice, L. iii. p. 1066 to 1073.

(x) *Maxwell v. Ward*, 11 Price, 18; *Lansdown v. Lansdown*, 2 Bligh, 60.

(y) *Bliss v. Collins*, 1 Jac. & W. 426.

(z) *Parsons v. Parsons*, 5 Ves. 578; and see *Yates v. Hambly*, 2 Atk. 363;

2 Mad. Chan. Pr. 477.

(a) *Johnson v. Johnson*, 3 Tyr. R. 73, and *id.* 83, where see the form of certificate in part, and declaring opinion as to the residue.

(b) *Gore v. Gore*, 9 Mod. 5.

(c) *Trent v. Hanning*, 10 Ves. 495, 506; *Utterton v. Vernon*, 3 T. R. 539; 4 T. R. 570, S. C.; Newl. Chan. Pr. 181.

(d) *Morgan v. Horseman*, 3 Taunt. 245.

(e) 2 Madd. Chan. Pr. 474.

CHAP. V.
SECT. III.

Exchequer.(f) When it is considered that cases are thus sent by Courts of Equity to Courts of Law merely with a view to assist the former, and that the opinions of the judges of the Courts of Law are not obligatory, it would seem that the form of the assistance by a mere concise answer, without stating any principle or assigning any reason in the certified decision, is but little calculated to afford the desired assistance, especially as the equity judge is not present at the hearing. In fact, however, the most liberal and explanatory communications are privately made to the equity judge if he so require. It might be desirable if the superior Courts of Law had a corresponding right to require the formal opinion of the judge of a Court of Equity in cases where the rules or practice in equity may be doubtful. But no such right exists, though in all the judicial departments there is a most liberal disposition to afford full information respecting the practice of each Court, and the principles upon which the same is founded.

Trial of Issue in fact directed by a Court of Equity or by a statute.

Courts of Equity have long exercised a jurisdiction extremely beneficial to suitors, of directing an *issue* upon some matter of *fact* to be tried in a Court of Law, when in the course of a suit otherwise properly instituted in a Court of Equity an intricate or difficult question of fact arises; and with directions sometimes that the parties to the suit may themselves be examined, instead of putting the parties to a diffuse and unsatisfactory examination of witnesses on interrogatories. A Court of Equity *may*, by interlocutory order, either direct an issue, or give the party liberty to bring an action within a limited time, and reserve the consideration of all further directions till after the verdict.(g) And it is said that an *heir* and a *rector or vicar* have an *absolute right* to have such issue on a question of fact, though in other cases it is discretionary in the Court of Equity to direct such issue.(h) So numerous acts of parliament authorize an issue, sometimes termed a *feigned issue*, and the Courts of Law, in discussing motions on the validity of a warrant of attorney, frequently direct an issue to try a question of forgery, usury, &c.(i) Where a Court of Equity has sent an issue to be tried at law, there cannot be a motion in arrest of judgment, such a motion being incom-

(f) *Wheeler v. Duke and others*, 3 Tyr. R. 61; *Johnson v. Johnson*, id. 73; *Ward v. Swift*, id. 122.

(g) *Earl Pomfret v. Smith*, 4 Bro. P. C. 700; Chit. Eq. Dig. tit. Practice, p. 1068.

(h) 2 Madd. Chan. Pr. 474; and *post*

as to the jurisdiction of the Court of Chancery.

(i) *George v. Stanley*, 4 Taunt. 683. So in *Gurney v. Langland*, 5 B. & Ald. 530, the Court of King's Bench directed an issue to try whether the plaintiff had signed the warrant of attorney.

patible with the equitable nature and object of the issue and of such a Court, to ascertain a fact without regard to technical objections to pleading. *(k)* And for the same reason, in general the application for a new trial of such an issue must be made to the Court of Equity; *(l)* unless the judge who tried the cause has given leave to move, or when an *action* has been brought in pursuance of the order of a Court of Equity, in which case the motion for a new trial may be to the Court of Law. *(l)*

In aid of the jurisdiction of inferior Courts, when the defendant has removed himself or *his effects* out of the jurisdiction of an inferior Court, and the debt is under £20, this Court, and indeed also the Courts of Common Pleas and Exchequer, may, under the 19 G. 3, c. 70, s. 4, and 7 & 8 G. 4, c. 71, s. 6, remove the record of the proceedings from the inferior Court, and issue execution against the defendant's person or effects in any county of England. *(m)* But these acts do not extend to an action of *ejectment*, and are confined to *personal* actions. *(n)* There are however similar enactments in some of the Courts of Request, as the Bath Act and others. *(o)*

In aid of inferior Courts in enforcing their civil jurisdiction by *certiorari*, &c.

As an essential mode of exercising a controul over all inferior Courts, this Court has a most extensive power to bring before it their proceedings, and fully to inform itself upon every subject essential to decide upon the propriety of the proceedings

General utility of the writ of *certiorari* returnable in K. B.

(k) *Moseley v. Davies*, 11 Price, 162.

(l) 6 Taunt. 444; 6 D. & R. 71; 2 Chit. R. 270; Tidd, 913.

(m) Tidd, 9th ed. 401; 19 G. 3, c. 70, s. 4; 7 & 8 G. 4, c. 71, s. 6. By the 19 G. 3, c. 70, s. 4, reciting, that forasmuch as persons served with process issuing out of inferior Courts where the debt is under ten pounds,* may, in order to avoid execution, remove their persons and effects beyond the limits of the jurisdiction of such Courts, enacts, that in all cases where final judgment shall be obtained in any action or suit in any inferior Court of Record, it shall and may be lawful to and for any of his Majesty's Courts of Record at Westminster, upon affidavit made and filed therein of such judgment being obtained, and of diligent search and inquiry having been made after the person or persons of the defendant or defendants, or his, her or their effects, and of execution having issued against the person or persons or effects, as the case may be, of the defendant or defendants, and that the person or persons or effects of the defendant or defendants are not to be found within the jurisdiction of such inferior Court, which affidavit may be made before a judge or commissioner authorized to take affidavits; and such superior Court to cause the record of the said judgment to be removed into such superior Court, to issue writs of execution thereupon to the sheriff of any county, city, liberty or place, against the person or persons or effects of the said defendant or defendants, in the same manner as upon judgments obtained in the said Courts at Westminster; and the sheriff upon every such execution shall and he is hereby authorized to detain the defendant or defendants until the sum of twenty shillings be paid to him, or to levy the same out of the effects, according to the nature of the execution, for the extraordinary costs of the plaintiff or plaintiffs in the inferior Court subsequent to the said judgment, and of the execution in the superior Court, over and above the money for which such execution shall be issued.

(n) *Doe d. Stansfield v. Shipley*, M. T. 45 G. 3, c. lxxvii. s. 27; and the other acts, K. B. A.D. 1833, Legal Observer, 139. Tidd, 402.

(o) See the clause in the Bath Act,

* Extended to £20 by 7 & 8 G. 4, c. 71, s. 5.

CHAP. V.
SECT. III.

below. This is effected by a writ called *certiorari*, though its mandate is *to send* to the Court above the original proceedings, with all things touching the same. The writ issues in civil as well as criminal cases. Thus, such a writ was ordered to be issued to the judge of an inferior jurisdiction, to return and certify the *practice* of his Court; (*p*) and it lies to remove the proceedings in an action of ejectment from an inferior Court into K. B., and an habeas corpus cum causa is not requisite; (*q*) and this is the mode by which a defendant may, in such an action, remove the proceedings on an affidavit that he cannot have a fair and impartial trial in the Court below. (*r*) But as in criminal cases, so in civil, the Court will not remove the proceedings in an action after judgment below, especially when a judgment by default. (*s*)

Controul over by
Mandamus. (*t*)

We have also seen that this Court has a most extensive, and *indeed exclusive*, (*t*) jurisdiction (excepting in a few cases,) on motion supported by affidavits for a rule to shew cause, or a rule peremptory why a writ of *mandamus* should not issue to compel all inferior Courts and officers, and sometimes even private persons, to perform certain acts in general of a *public* nature, or in connexion with a *public duty*, and then even in favour of a private individual and his private right; (*u*) and analogous in some respects to, but even more extensive than the power of a Court of Equity by bill and decree to enforce *specific performance* of some acts, principally contracts. (*x*) As to the examination of witnesses in India, the 13 G. 3, c. 63, s. 44, authorizes the plaintiff or defendant to issue the writ out of *either* of the Courts at Westminster. (*y*) But in general this exceedingly important jurisdiction is peculiar to the Court of K. B. The costs of this proceeding are regulated by 1 W. 4, c. 21. We have in the previous volume so fully stated the substance of this remedy, that any further observations here would be useless repetition. (*z*) We have seen that Courts of Equity have two modes of compelling parties to perform what they ought to perform, and to forbear doing that which they ought not to do, viz. by *bill* for *specific performance*, or by bill and *injunction*, *prohibiting* the doing or continuing a particular

Suggestion for
the extension of
the remedies by
mandamus and
prohibition.

(*p*) *Williams v. Bagot*, 4 D. & R. 315.
(*q*) 1 B. & C. 253; 2 D. & R. 407.
(*r*) 3 B. & C. 550; 5 D. & R. 445.
(*s*) *Walker v. Gann*, 7 D. & R. 769.
(*t*) *Ante*, vol. i. 789 to 810, as to mandamus, Selw. Ni. Pri. tit. Mandamus; Tidd's Supplement, A.D. 1833, 206 to 211; and 1 W. 4, c. 21.
(*u*) *Ante*, vol. i. 790.

(*x*) As to which, see *ante*, vol. i. 824 to 872.

(*y*) *Ante*, vol. i. 789, note (*e*); and the recent act just noticed for enforcing the examination of witnesses *any where*, obviously greatly extended that jurisdiction.

(*z*) *Ante*, vol. i. 789 to 810, and this volume, 190, 201, 218, 229.

act; and it is singular how ingenious those Courts have been, in so varying the forms of those two important remedies as to effect the equitable object in view. Thus we have seen an instance of an *injunction* not to *permit* parts of buildings erected contrary to an agreement *to remain*, which was in effect a mandamus in *Equity* to *pull down and remove*. (a) And there seems no reason why, by the just application at law of the writ of mandamus and the writ of prohibition, justice should not be more perfectly administered in Courts of Law than has hitherto been the practice.

This Court has also very extensive, although not entirely exclusive jurisdiction, by *prohibition* (somewhat analogous to an injunction from a Court of Equity,) to restrain all other Courts, from the highest to the lowest, and whether or not of record, from proceeding in a matter over which they have no jurisdiction; (c) or when, having jurisdiction, the Court has attempted to proceed by rules differing from those which ought to be observed, (d) or where, by the inferior Court's exercise of its proper jurisdiction, a legal right would be defeated; as when an attorney held a will as a lien, and the Prerogative Court had granted probate to another person, the Court of K. B. by prohibition restrained the Ecclesiastical Court from acting on such probate, by which it might not only receive but distribute the whole of the assets, and defeat the lien. (e) In some cases the Court of Common Pleas (f) or Exchequer, (g) or the Court of Chancery (h) (but the latter only in vacation,) (i) may issue a prohibition. (k) But the Court of King's Bench is considered as the proper Court to apply to in term time, especially in cases of a public or criminal matter. (l) Though if a *quare impedit* be brought in an improper Court, it may be advisable to apply to the Court of Common Pleas for a prohibition, because that Court has exclusive cognizance of actions of *quare impedit*; (m) and if the king's farmer be sued in the Ec-

By Prohibition. (b)

(a) *Ante*, vol. i. 862, notes (m) and (n); *Rankin v. Huskisson*, 1 Clark & Fin. 13; *Lane v. Newdigate*, 10 Ves. 192.

(b) See the former proceedings in prohibition, 1 Saund. 136 to 142; 2 Sellon Pr. 424 to 455; and the Modern Prac. Tidd, Supplement, 1833, 200 to 206; 1 W. 4, c. 21; 2 Dowl. Stat. 37, 38, 39, and notes; Harrison's Index, Inferior Courts, II. Prohibition.

(c) See in general Bac. Ab. tit. Prohibition; Com. Dig. tit. Prohibition; Harrison's Index, Inferior Courts, II. Prohibition; 2 Sellon Pr. 1 ed. 424 to 455; Tidd, Supplement, 1833, 200; and 1 W. 4,

c. 21, altering the practice, and *post*.

(d) *Gloucester v. Bradley*, Bul. N. P. 219.

(e) See *post*, 357, note (a).

(f) *Hutton's case*, Hob. 15.

(g) *Slea v. Seymore*, Palmer, 525.

(h) *Anon.* 1 P. Wms. 476.

(i) *Montgomery v. Blair*, 2 Sch. & Lefr. 136; 9 Ves. 257; Willes' Rep. 426.

(k) Bac. Ab. Prohibition, A.; Bro. Ab. tit. Prohibition, pl. 6; Inst. 81; Willes, 43.

(l) *Company of Horners*, 2 Rol. R. 471.

(m) Moore, 861; Bac. Ab. Prohibition, A.

CHAP. V.
SECT. III.

clesiastical Court for tithes, then it may be advisable to apply to the Exchequer for a prohibition on affidavit of a prescription for a modus, because that Court has peculiar cognizance of tithe suits and matters. (n) The writ of prohibition perhaps may be issued even to the Chancellor sitting in bankruptcy, if he should inadvertently assume a jurisdiction which he has not ; (o) at least there appears to be no exception as regards the dignity of the Court or person, and it may be issued to every description of Court, of whatever nature and however high or inferior; as to the county palatine, to the Ecclesiastical Court, in a tithe or other suit there, (p) to the Admiralty Court, Prize Court, County Court, (q) or to the sheriff, to prevent him from proceeding in a replevin suit where the replevy had been granted by a bailiff improperly appointed, (r) and to a Court of Requests, as where that Court, without authority, enjoined a creditor to give time to his debtor to pay his debt, upon security given, (s) or even to the Insolvent Court, (t) or to a justice of the peace to *prohibit* the proceeding to execution upon an unjust conviction, upon any information where he had refused to hear the merits, at any time whilst the conviction remained below and had not been removed by certiorari into this Court. (u) And perhaps in all cases (and especially so in cases where the removal of a conviction is expressly prohibited by statute) when a justice of the peace has manifestly convicted against the merits of the case, an immediate motion to the Court upon full affidavits for a writ of prohibition or for a rule nisi, may be an expedient proceeding, first giving six days' notice of motion in the alternative for that writ, or for a certiorari. The writ is also sustainable not only when a Court has *no* jurisdiction over the matter, but also when it is *proceeding irregularly* or improperly, as by requiring two witnesses to prove a fact, when by law only one witness was necessary. (x)

The writ is directed to the judge and the plaintiff in the suit

(n) Palm. 525 ; Bac. Ab. Prohibition, A.

(o) *Ex parte Cowan*, 3 B. & Ald. 123, cited *Ex parte Battine*, 4 B. & Adol. 693. This seems to be a disputed point, see 3 Bulst. 120 ; Bac. Ab. Prohibition, I. 7th edit. ; Ld. Raym. 531.

(p) And see 2 & 3 Ed. 6, c. 13 & 14 ; Tidd, 948.

(q) *The King v. Clarke*, 1 B. & Adol. 672 ; see cases 2 Sellon's Pr. 424, 425, 426 ; Bac. Ab. Prohibition, K. ; 3 Bla. Com. 113 ; Tidd's Prac. Supplement, 200.

Prohibition lies of trespass vi et armis, when brought in county Court, F. N. B. 47.

(r) *Griffiths v. Stevens*, 1 Chit. R. 196.

(s) Bulst. 20 ; Bac. Ab. Prohibition, I.

(t) *Ex parte Battine*, 4 B. & Adol. 693.

(u) Per Ld. Holt, C. J., in 2 Ld. Raym. 901 ; *Crephe v. Durdan*, Cowp. 646 ; 1 B. & Adol. 586, a. ; *ante*, this vol. 220, 221.

(x) 3 T. R. ; 2 Sellon's Pr. 425 ; 3 Bla. Com. 112.

in the inferior Court, commanding both to cease from the prosecution thereof, upon a suggestion that either the cause originally, or some collateral matter arising thereon, does not belong to that jurisdiction, but to the cognizance of some other Court. (*y*)

As regards Ecclesiastical Courts, Sir Simon Degge complained, that although prohibitions in themselves are excellent things when they are used upon just, legal and true grounds, yet as it sometimes turns out that they are applied for on untenable ground, and occasion great expense and delay, it would be well if the judges would think of some way to restrain them, or to make the applicants, when ultimately unsuccessful, pay well for their delay, by making the party applying enter into a recognizance to pay such costs as the Court, out of which the writ of prohibition issues, should award, in case the party should not succeed in his suggestion in convenient time, or some other course, to make them pay for the delay and increased expense by improperly objecting to the jurisdiction. (*z*) Where an attorney had a lien on a will, the Court of King's Bench even prohibited the Prerogative Court from proceeding on a probate until the lien had been satisfied. (*a*) The full extent of this jurisdiction, as well as the practical proceedings thereon, will be more properly considered in a subsequent chapter. (*b*) When a prohibition to an Ecclesiastical Court is to be applied for, as to prevent an improper suit therein relating to a pew, it is not necessary that the proceedings in the Ecclesiastical Court should be actually *at issue*, and it suffices if that Court be clearly *in progress* towards the trial of a question which ought properly only to be tried in a Court of Law. (*c*) The practice in prohibition has, by 1 W. 4, c. 21, s. 1 & 2, recently been greatly improved, by dispensing with the former necessity for filing a suggestion stating the proceedings below before the motion to this Court, and by enacting that the application may be made on affidavit only, (*d*) and the practice therein has otherwise been changed, and the party succeeding is now entitled to costs, (*d*) provided there have been *pleadings*

(*y*) 3 Bla. Com. 112.

(*z*) Degge, p. 2, c. 26; Burn. Ecc. L. Prohibition, p. 230, 231.

(*a*) Wood's case before Sir J. Nicholl, Prerogative Court, 3 July, 1834. But the Prerogative Court afterwards granted limited letters of administration to the widow to enable her to get in the effects, *post*, Prerogative Court. *Quære* as to any

lien on an original will, *ante*, vol. i. 513, note (*n*).

(*b*) See in general 2 Sellon's Prac. 424 to 455; Tidd, 498.

(*c*) *Byerley v. Windus*, 4 Law Journal, K. B. 102.

(*d*) Tidd, 948, and stat. 1 W. 4, c. 21, and notes; Dowl. Stat. vol. ii. 37, 38, 39; Tidd's Supplement, 1833, pp. 200 to 206. In Chancery, as well as in the Courts of

CHAP. V.
SECT. III.

in prohibition, but not so where a rule is made absolute for a prohibition before plea. (e) It has been supposed that the *damages* to be recovered in prohibition should, as heretofore, still be merely nominal, (f) but the statute supposes actual damages to be recoverable, and there are instances where considerable damages have been recovered. (g)

But although the Court of King's Bench has in proper cases power to prohibit naval and military Courts Martial, (h) yet that Court refused to prohibit the carrying into effect the sentence of a Court Martial, even on the ground that the facts alleged against the party were not sufficient to bring his offence within the articles of war, and for which the Court Martial had sentenced him to be dismissed the service, and which sentence had been ratified and allowed by the king; for a Court Martial stands on grounds peculiar to itself, and as the king had ratified the sentence, and he might dismiss, even without the intervention of a Court Martial, the interference of the Court of King's Bench would be futile and useless. (i)

Prohibition to
prevent injury.

In some respects also the Court of King's Bench has jurisdiction by writ of *prohibition*, not only to prevent *another Court* from proceeding where it has no jurisdiction, but also to prevent the committing of a *public irremediable* injury, and analogous to the jurisdiction in equity of granting an *injunction*; but the Court seems reluctant to exercise this summary excellent jurisdiction unless in a very clear and urgent case, and will in general leave the applicant to proceed by *indictment* for the injury when completed, or to apply to a Court of Equity for an *injunction*; that Court in general interfering to prevent by *injunction* the completion of *waste* and *nuisances*, public and private, but not other crimes or injuries. (k) Where justices of the peace for the county of Dorset having under 43 G. 3, c. 59, contracted for the building of a new bridge in a different site, in lieu of the old one which was ruinous, and having directed the old bridge to be taken down *before the new one was pass-*

Law, the motion for a prohibition is to be grounded on an affidavit, (*Worcester v. Bennett*, Dick. 143, 336; 7 Ves. 254,) and the form of such affidavit in equity has been suggested, (7 Ves. 254,) and it is said that the defendant in the inferior Court must plead before he applies for a prohibition. (*Walker v. Fandehide*, Dick. 336; Dowl. Pr. R.)

(e) *R. v. Keeling*, 1 Dowl. Pr. Rep. 440; Tidd's Supplement, 1833, p. 205, and *Pewtress v. Harvey*, 1 B. & Adol. 154.

(f) Bull. N. P. 219; Tidd's Supple-

ment, 1833, p. 204.

(g) Dowling's Statutes, 1 W. 4, c. 21, page 38, note (a); but see the statute and *Auger v. Brewer*, 1 Vent, 348, where 100*l.* damages were recovered; and see observations in *Pewtress v. Harvey*, 1 B. & Adol. 158.

(h) *Grant v. Gould*, 2 H. Bla. 100.

(i) *Ex parte Poe*, King's Bench, 14 Nov. 1833; and see *Grant v. Gould*, 2 H. Bla. 69, 100.

(k) *Ante*, vol. i. 696, 721 to 729; not other crimes, *id.* 697.

able, in order that the contractor might use the materials of the old bridge, the Court of King's Bench refused a writ of prohibition to them, to restrain them from pulling down the old bridge before the new one was passable, though there were strong affidavits of the inconvenience and loss to be sustained by the neighbourhood in being obliged to use a roundabout way in the interval, and the Court referred the complainants to the ordinary remedy by indictment, if the pulling down the old bridge under those circumstances should constitute a nuisance, and the Court seeing no occasion to interfere by applying a prompt remedy of a novel kind in modern practice. (l) But as the motion for a prohibition was merely refused under the particular circumstances, that decision clearly establishes the general jurisdiction of the Court to prevent at least all public injuries when they think fit. And certainly the exercise of this high preventive jurisdiction cannot be too much extended, since laws for prevention are better than laws for punishment, (m) especially when the wrongful act about to be done will occasion public or extensive injury, which cannot be compensated, and perhaps very inadequately punished by indictment. Assuredly as a *single* judge in a Court of Equity is by law entrusted with jurisdiction to issue an injunction, there is no reason why the four judges of a Court of Law should not exercise a jurisdiction which is most salutary, and is unquestionably vested in them. But nevertheless *in practice* there is no remedy in Courts of *Law* to prevent any injury, (except personal violence, by articles or sureties of the peace,) and no Court at present interferes to *anticipate and prevent* other continuous or repeated injuries, as libels, attempts to seduce a daughter, and numerous other injuries, which can only be *punished* after they have been committed, by a person perhaps wholly unable to pay any damages he has maliciously occasioned. (n) It was held in the Court of Common Pleas, that that Court has no power to issue an original writ of prohibition to restrain a bishop from committing waste in the possessions of his see, at least at the suit of an uninterested person; and it was supposed that no Court of Common Law has that power, such waste being in the nature of a mere private injury; and it was even

(l) *R. v. Dorset*, 15 East, 594. And see other cases, *ante*, vol. i. 803, tit. *Public Works*.

(m) *Wilcock v. Windon*, 3 B. & Adol. 43; and *Venegan v. Attwood*, 1 Mod. 202, *ante*, vol. i. 19.

(n) It is submitted that there is a de-

fect in the practice of the law. It would be well if Courts of *Law* in practice interfered, on affidavit and motion, to prevent every description of crime and injury which it could be demonstrated a party was about to commit.

CHAP. V.
SECT. III.

As a Court of Appeal in civil cases, as *formally* by writ of error or false judgment, or *summarily*.

doubted whether the Court of Chancery had any jurisdiction. (o) It seems to be a disputed point whether a prohibition lies so as to decide upon a controversy whether a will ought to be proved before a peculiar or before the ordinary, or what ecclesiastical judge shall grant probate. (p)

Before the 1 W. 4, c. 70, s. 18, a writ of error from the judgment of the Court of Common Pleas, upon matter of *law*, was returnable in King's Bench, (q) and this even in a real action, over which the latter Court had no original jurisdiction; but that act, we have seen, now requires all writs of error from the Court of Common Pleas to be returnable direct into the Exchequer Chamber. (r) But still from *all inferior Courts of Record* (excepting in London and a few other places) the writ of error is returnable in King's Bench and not in Common Pleas; (s) but no writ of error nor certiorari lies from the Mayor's Court or other Court in London, (t) from which there is a peculiar Court of Error. (u.) Writs of *error in fact*, as infancy (x) and coverture, lie from a judgment of the Court of Common Pleas, returnable in that Court or in King's Bench; for the statute 1 W. 4, c. 70, s. 8, does not extend to errors in fact; and for an error in *fact* in a judgment of this Court the writ of error is returnable here in the same Court. (x)

A writ of *false judgment* from the formal judgment of an inferior Court, not of record, but proceeding *according to the course of the common law*, and which writ is issued out of Chancery, is properly returnable into this Court or in the Common Pleas. (y) But no such writ lies from a Court of Requests or other Court, which by statute is directed to give judgment according to equity and good conscience, and not according to the usual course of proceeding at common law, because a Court so constituted is not bound by the rules of pleading or evidence as in formal suits at law; and therefore where such writ was brought from the Southwark Court of Requests to the Court of Common Pleas, the latter directed it to be sent back by writ

(o) *Jefferson v. Durham*, 1 Bos. & Pul. 105. But see 3 Swanst. 493, 499. See *ante*, vol. i. 722 to 731, as to injunctions in equity to restrain waste.

(p) Bac. Ab. Prohibition, I.; Mod. 211, *acc.*; 10 Mod. 272.

(q) Tidd, 1137.

(r) *Ante*, 308, 309.

(s) Tidd, 1137, 1138; *Ballard v. Bennett*, 2 Burr. 777; Finch, L. 480; *Ap Richards v. Jones*, Dyer, 250; *Roe v. Harth*, Cro. Eliz. 26; 3 Bla. Com. 410.

(t) *Ibid.*; *Clarke v. Le Cren*, 9 Bar. & Cres. 57; *Watson v. Clarke*, Carth. 75; *Ballard v. Bennett*, 2 Burr. 777.

(u) 6 Bro. P. C. 181; *Ballard v. Bennett*, 2 Burr. 777; *Cole v. Green*, 1 Lev. 309; 2 Saund. 253, S. C.

(x) *Castledine v. Mundy*, 4 B. & Adol. 90.

(y) See Fitz. N. B. 18; Tidd's Forms, 559; Tidd, vol. i. 38, and *fully* vol. ii. 1134, 1187, 1188.

of procedendo. (2) In general the decisions of Courts of Requests are final, unless in some of the acts, as now in the Southwark act, the proceedings in which are *now* removable by certiorari, and if erroneous may be set aside by the Court of King's Bench. (a)

The Courts of King's Bench and Common Pleas (not the Exchequer, but for what reason does not appear,) are constituted Courts of Summary Appeal from the decision of justices of the peace, when they have, under the 11 G. 2, c. 19, s. 16, given possession of tenanted premises, upon the supposition of the tenant having deserted them when the rent has been in arrear; and the 17th section of that act enables the tenant to appeal to the judges on the circuit, or the Court of King's Bench or Common Pleas (but singularly, *omitting the Exchequer*,) when the premises are in London or Middlesex, and which judges may order restitution or may affirm the act of the justices. (b) It has been decided that a landlord may proceed under the 16th section of the act, although he knew where the tenant was to be found, and although the justices found a servant of the tenant on the premises when they first went to view the same; and the justices' record need not state the landlord's reserved right of re-entry, although such right must have in fact existed. (c) The Courts, under this power of appeal, are not bound by any strict rule, and may order restitution on such equitable terms as they shall think fit, although the landlord's legal right of re-entry was clear and the proceedings perfectly regular. (d) Upon the other hand, although the decision of the justices may be reversed, yet their own record protects them and all acting under them from liability to any action. (e)

Landlord and
Tenant. Ap-
peal from
justice's deci-
sion.

The Court of King's Bench, or its judges, are in may in-

As a Court of
Appeal in other
cases.

(s) *Scott v. Bye*, 9 Moore, 649; 2 Bing. 463, S. C. Bing. 344, S. C.; *Bates v. Turner*, 10 (a) 4 G. 4, c. 123, s. 15, 16; *Carden Moore*, 32; *Tingle v. Roston*, *id.* 171; 2 v. *Burford*, 2 Man. & Ryl. 170.

(b) 11 G. 2, c. 19, s. 17. Provided always, that such proceedings of the said justices shall be examinable in a summary way by the next Justice or Justices of Assize of the respective counties in which such lands or premises lie; and if they lie in the city of London or county of Middlesex by the Judges of the Courts of King's Bench or Common Pleas; and if in the counties palatine of Chester, Lancaster, or Durham, then before the judges thereof; and if in Wales, then before the Courts of Grand Sessions respectively; who are hereby respectively empowered to order restitution to be made to such tenant, together with his or her expenses and costs, and to be paid by the lessor or landlord, lessors or landlords, if they shall see cause for the same; and in case they shall affirm the act of the said justices, to award costs not exceeding five pounds for the frivolous appeal. See the statute Chitty's Col. Stat. tit. Landlord and Tenant, 673, 674, and notes.

(c) *Ex-parte Pilton*, 1 B. & Ald. 369. 649; 5 Dowl. & R. 558, S. C. And as to proceedings, see *Lister v. Brown*, 3 Dowl. & R. 501; 1 Car. & P. 121, S. C.; *Basten v. Carew*, 3 Bar. & C. (d) MS. K. B. (e) *Ashcroft v. Bourne*, 3 B. & Adol. 684.

CHAP. V.
SECT. III.

stances constituted by statute, in effect though not in form, a *Court of Appeal* from inferior commissioners or persons, as under the assessed-tax acts, when the commissioners are directed, at the instance of appellant or assessor, to state a case for the opinion of one of the judges of King's Bench, Common Pleas, or Exchequer. (*f*) But as these cases are not discussed in open Court, the proceedings relative to them are not strictly parts of the practice of the Courts. Formerly, in one case the Court of Exchequer ordered the commissioners of taxes to sign a case for the appellants for the opinion of a judge, where a question arose respecting certain increase of duty made by the surveyor or the appellant. (*g*)

Anciently, when the judges had comparatively but little business to transact in full Court, or on the circuit, we find historically that many questions of law, and in some respects of fact, used to be referred to one or more of the judges, especially on the circuit; (*h*) also the propriety of corporation bye-laws; (*i*) and all questions upon which justices at sessions had doubted and had required assistance and advice. (*k*) But in the present times, when the arduous higher duties of the judges have so greatly increased, they ought to be relieved from all these collateral functions, which exact the performance of burdensome duties foreign to their proper functions and much beyond any reasonable claim upon them as incidents of their office; and accordingly, the approval of the regulations of Savings' Banks and some others have of late been delegated to a barrister. (*l*)

Secondly, Jurisdiction of K. B. over cases of a criminal or public nature.

The King's Bench has also *original* jurisdiction, by *indictment* or *criminal information*, over most *crimes*, *misdemeanors*, and *offences* committed in Middlesex, or whilst the Court was ambulatory, committed in any county in which it happened to sit, and indeed these subjects were originally the *principal objects* of its jurisdiction. This Court, indeed, is the highest and most extensive of *criminal* justice within the realm as regards such offences, for there is no other Court of *general* criminal jurisdiction, or for controlling or appealing from any

(*f*) 43 G. 3. c. 99, s. 29, and c. 161, s. 73; 45 G. 3, c. 71, s. 3; 4 G. 4, c. 11, s. 7.

(*g*) *In re Yarmouth Commissioners*, 9 Price Rep. 149, post, Exchequer.

(*h*) See Burn's Justice, tit. Poor, 26 ed. vol. iv. 786, 787; *R. v. Natland*, Bur. Set. Cases, 793; *Curedon v. Leyland*,

2 Stra. 903; and Burn's Justice, tit. Sessions of the Peace, IV. (3); Dick. Sess. 627.

(*i*) 19 Hen. 7, c. 7; *Chamberlain of London's Case*, 5 Coke, 63 b.; Com. Dig. Bye Law, C.; Rol. Ab. 363.

(*k*) *Supra*, note (*h*).

(*l*) 9 G. 4, c. 92, s. 4; 5 W. 4, c. 40.

other inferior criminal jurisdiction; and as to offences committed in the county where it sits, this Court has a jurisdiction so paramount to all others, that, therefore, if it were not for the express enactment in 25 G. 3, c. 18, it would during each term supersede or suspend all other criminal jurisdiction in that county. (m) It has, at common law, jurisdiction by *indictment* By Indictment. over every description of criminal offence committed in Middlesex, from high treason and felony down to the smallest misdemeanor or breach of the peace. (n) Indictments for *Perjury* (which in general cannot be preferred at the general or quarter sessions, but only at the assizes, or in this Court, when the perjury was in Middlesex, (o)) and *Conspiracies* are now the most frequent in this Court, especially when for perjury in answers or affidavits. So by different statutes, some offences committed out of the realm may be prosecuted by indictment in Middlesex; (p) but in general, without some express enactment, offences committed out of England are not cognizable in this Court; (q) and when the offence has been committed out of the kingdom, it is now more usual to proceed by special commission—as for a murder by duelling in France, or elsewhere abroad, between two subjects, or a subject and a foreigner. (r) For the purpose of exercising this criminal jurisdiction by indictment in Middlesex, grand juries for Middlesex are, on two days in each of the four terms, summoned and sworn before the senior of the puisne judges, and who charges or addresses them respecting their duty in the Court of King's Bench, and which constitutes the first business in the morning, before the sitting of the full Court; and such jury afterwards find or ignore bills of indictment presented to them for crimes committed in the county, principally for conspiracies, perjury, and other misdemeanors, and afterwards come into full Court and present their findings, and which are then filed in the Crown Office; and after the issues have been joined, they are tried at nisi prius amongst the civil causes. (s)

So all *misdemeanors*, whether committed in Middlesex, or in any county in England, may, as regards *jurisdiction*, be prosecuted by *criminal information* filed by the Attorney-General ex By Criminal Information.

(m) Bac Ab. Court of King's Bench, B.

(n) *Lord Sanchar's case*, 9 Coke, 118 a, b; 2 Sellon, 618.

(o) Hawk. B. 2, c. 8, s. 64; 2 Stra. 1088; 2 Ld. Raym. 1144; 1 Salk. 407; and see *R. v. Haynes*, 1 Ry. & Mood. 298, that if originally an indictment for perjury were found at sessions, and removed into K. B. by certiorari, the Court

cannot try it.

(p) 42 G. 3, c. 85; *R. v. Jones*, 8 East, 31; 24 G. 3, s. 2, c. 25; *R. v. Holland*, 5 T. R. 607; *R. v. Platt*, 1 Leach, 157; 1 Hale, 1.

(q) 1 Sess. Cas. 266; *R. v. Munton*, 1 Esp. R. 62.

(r) *R. v. Helsham*, 7 Oct. 1830, 1 Burn. J. tit. Duelling.

(s) Hand's Prac. Introd. xx.

CHAP. V.
SECT. III.

officio, *i. e.* of his own authority, without the previous leave of the Court; or on the application of a subject to and by leave of the Court, an information for such misdemeanor may be filed in the Crown Office; and by various statutes, some offences committed out of the kingdom are cognizable in this Court. (t)

In no case of *treason* or *felony* can an *information* be sustained, but there must be a bill of *indictment* for such higher offences *found by a grand jury*. (u) The principal difference between the proceedings by indictment or by information is, that the former must be first presented to and found by a grand jury of the county in which the offence was committed, and afterwards tried by a petty jury; whereas, when the Attorney-General *ex-officio* files an information, or when upon affidavit and motion, and hearing of both parties on affidavit, the Court give leave to file an information, and it is accordingly filed, such permission of the judges indicating that upon the affidavits of the facts before them, there is in their opinion *reasonable ground* for the criminal information, is equivalent to and dispenses with the necessity for the finding of a bill of indictment by a grand jury; and the criminal process immediately issues against the offender, and who having appeared and pleaded to the information in the Crown Office, the issue thereon is sent down to be tried in the proper county by a petty jury, amongst the other records to be tried at *nisi prius*, or at the assizes on the civil side. When, therefore, a serious public misdemeanor has been committed, especially by a magistrate, or when a challenge has been sent, or a libel of an aggravated character has been published, requiring the immediate interposition of this Court, it is advisable, in order to prevent a further breach of the peace, to endeavour to obtain leave to proceed by criminal information, instead of waiting until the sessions or assizes, or incurring the risk of a grand jury ignoring the bill of indictment in consequence of local influence or favor.

With respect to misdemeanors in general, although unquestionably this Court has jurisdiction over every variety of that description of offences however inferior, yet great inconvenience having been felt from compelling persons in low circumstances to shew cause against informations in the King's Bench, and after conviction to travel to Westminster from perhaps a very remote part of the country, and consequently at a great expense

(t) 2 Hale, C. P. 3; *R. v. Munton*, 1 91; *R. v. Johnson*, 6 East's R. 589, 590.
Esp. R. 62; 1 Sess. Cas. 246; 2 New R. (u) 2 Hale, 151; 1 Shower, 109, 110.

and loss of time, to receive judgment, the Court came to a resolution not to grant any informations against such persons, however fit the subject might be in other respects for such mode of prosecution, as justice could be effectually done otherwise either at the sessions or at the assizes, and the proceeding by way of indictment is evidently the more proper in such cases; (x) and it has been regretted that the same rule has not been adopted by the attorney-general on prosecutions by him under the revenue laws; (y) however, the necessity for the party coming up to receive judgment has been recently in a great measure removed by the provision we will presently notice. (z) This Court has also resolved not to grant informations against overseers, or other persons, for procuring the marriage of a pauper with intent to burthen another parish, though formerly informations for such an offence were frequent. (a) But subject to these, and a few other exceptions in practice, a very considerable portion of the time of this Court is occupied by *motions for leave to file criminal informations in the Crown Office* either against magistrates or other public officers, or for challenges, libels, and other misdemeanors; and where the parties concerned are of rank, and the offence committed demands immediate interposition, and when the party applying can by affidavits demonstrate that he gave no provocation, and was wholly free from blame, or in case of libel free from the least ground of suspicion of the offence imputed to him, it may be advisable to adopt this course in lieu of preferring a bill of indictment to a grand jury, or proceeding by action, and in all those cases when it is almost certain that the Court will make the rule absolute. But where the party challenged or libelled is of inferior rank, or is not wholly free from blame, or the accused magistrate has acted *bonâ fide*, the Court will usually leave the prosecutor to proceed by indictment at the sessions or assizes, or by action. The jurisdiction to grant leave to file a criminal information in the Crown Office is one of the highest, and perhaps most delicate and discreet branches of jurisdiction, somewhat in the nature of the ancient Court of Honour; and accordingly a criminal information is granted or refused, not according to any strict legal rule, but depending on the question whether the party applying has in all respects acted as a gentleman, and therefore deserves the protection of the Court, or whether the other party has acted malignantly and without provocation. And when the Court refuse the application, it

(x) *R. v. Compton*, Cald. 246.(y) *Bac. Ab. tit. Informations*, D.

VOL. II.

(z) 1 W. 4, c. 70, s. 9.

(a) *R. v. Compton*, Cald. 246, 247.

E E

CHAP. V.
SECT. III.

Alteration in
the practice;
and of giving
judgment im-
mediately after
trial in criminal
cases.

does not necessarily follow that the applicant must pay costs, for sometimes the application will be discharged on the terms of the other party paying the costs.

Formerly, as an incident of the criminal jurisdiction of the Court, whenever there was a trial in any county of England upon a record out of the King's Bench for felony or misdemeanor, judgment was delayed until the next term, and then the party convicted, however impoverished and however long he had remained in prison, must have travelled up to London in order to hear the judgment of the Court in full Court, by which great trouble and expense to the parties, and to the public in case of paupers, was incurred, and the *effect of immediate punishment* as an example was prevented, and much valuable time of the Courts was consumed; (b) but now by 1 W. 4, c. 70, s. 9, (c) the judge who presides on the trial may pronounce judgment immediately after the sittings or assizes on the party convicted, whether by default, or confession or verdict, and whether such person be present in Court or not, except in cases of criminal information filed by *leave of the Court* or information filed by *the attorney-general*, and wherein he shall pray that the judgment may be postponed, but the Court above may still on motion grant a new trial. (d) This enactment, by enabling the judge to pronounce judgment immediately after the trial, gives more salutary effect by way of example, and prevents much expense and delay and consumption of time in Court, and long imprisonment whilst waiting

(b) The 5 W. & M. c. 11, recites, that defendants used to remove indictments by certiorari, "fearing to be deservedly punished *where* they and their offences are well known," thereby importing that the legislature then thought that probably the

trial and judgment were usually most efficacious when in the neighbourhood of the place where the offence was committed, than at a distance in the Court of King's Bench.

(c) 1 W. 4, c. 70, s. 9, enacts, That "upon all trials for felonies or misdemeanors upon any record of the Court of King's Bench, judgment may be pronounced during the sittings or assizes by the judge before whom the verdict shall be taken, as well upon the person who shall have suffered judgment by default or confession upon the same record, as upon those who shall be tried and convicted, whether such persons be present or not in Court, excepting only where the prosecution shall be by *information filed by leave of the Court of King's Bench*, or such cases of informations filed by his Majesty's *Attorney General*, wherein the Attorney General shall pray that the judgment may be postponed, and the judgment so pronounced shall be indorsed upon the record of *Nisi Prius*, and afterwards entered upon the record in Court, and shall be of the same force and effect as a judgment of the Court, unless the Court shall within six days after the commencement of the ensuing term grant a rule to shew cause why a new trial should not be had or the judgment amended, and it shall be lawful for the judge, before whom the trial shall be had, either to issue an immediate order or warrant for committing the defendant in execution, or to respite the execution of the judgment, upon such terms as he shall think fit, until the sixth day of the ensuing term, and in case imprisonment shall be part of the sentence, to order the period of imprisonment to commence on the day on which the party shall be actually taken to and confined in prison.

(d) See Chit. Pr. 185, 186; *R. v. Cox*, 4 Car. & P. 538; *R. v. Woodward*, id. 540.

until the next term; and the only danger may be that possibly some judge might, under the excitement occasioned by the profligacy of the offender, in some case pronounce a more severe punishment than perhaps the full Court might, at a subsequent period, have inflicted.

It is only in this superior Court, or by application to the Chancellor, that *articles of the peace* can be exhibited so as to obtain security against threatened personal injury, when the party against whom the application is to be made is a peer, for the Courts of Common Pleas and Exchequer have no jurisdiction in those cases. (e) In ordinary cases application must be first made to a local magistrate or court of session for sureties to keep the peace; but if the party required to find sureties be a peer, or the local magistrates have refused to interfere, or if the parties be of rank, or be a married woman and require immediate protection against her husband, this Court may with propriety be applied to. (f)

Articles of the
peace.

Another very important and extensive jurisdiction peculiar to this Court, *nominally*, in some respects, as being on the same side of the Court, *criminal*, but considered as *substantially civil*, relates to *franchises* and *liberties*, and to *corporations* and *offices* of a *public nature*, where any subject or body politic has usurped or assumed to act on any franchise or privilege not being legally entitled, and which is supposed to be either injurious to another party really entitled to the franchise, or to the public, and which proceeding calls on the defendant to shew by what authority (*quo warranto*) he has assumed to act in some named *public office*, &c. An information in the nature of a *quo warranto* cannot be filed against an *entire corporation* by the master of the Crown Office, but can only be filed by the attorney-general, (h) though when only a *particular individual* illegally usurps an office or franchise in an acknowledged corporation it is otherwise. (h) So there is no instance of a *quo warranto* information having been granted by leave of

Quo War-
ranto. (g)

(e) Hawk. b. i. c. 60, s. 3; *ante*, vol. i. 679.

(f) See the cases and practice, *ante*, vol. i. 679 to 684.

(g) See in general, Bac. Ab. Information, D. *id.* Appendix, same title; Selwyn Ni. Pri. *Quo Warranto*; Harrison's Index, *Quo Warranto*; 9 Ann. c. 20, s. 4; 32 G. 3, c. 58; 48 G. 3, c. 58; Tidd, 595,

949.

N.B. It would be impossible here to notice the whole law of corporate and other rights, or the whole proceeding on *quo warranto*. Many cases will be found in the Law Journal not elsewhere reported. See *Exchequer*, *post*, 395.

(h) *R. v. Ogden*, 10 B. & C. 230; 9 Ann. c. 20.

CHAP. V.
SECT. III.

the Court against persons for usurping a franchise of a mere *private* nature not connected with *public* government, (i) in which respect the interference of this Court in cases of *quo warranto* is influenced by the same principle as in the instance of granting a *mandamus*. (k) In these cases the Court (having a *discretionary* jurisdiction, (l) but which is influenced by decisions and long practice) may, upon proper affidavits, grant a *rule* to shew cause why an information *in the nature* of a *quo warranto*, directed to the party supposed to have been guilty of the usurpation, should not issue; and which rule is afterwards discharged or made absolute according to circumstances; or the Court receives an information, filed *ex officio* by the proper officer of the crown, upon facts disclosed in the affidavits of private persons shewing sufficient ground for the interposition of this Court; and if the usurpation upon the trial be found unlawful, then the party proceeded against will be ousted, and the franchise, if capable of seizure, seized into the king's hands. (m) Informations in the nature of *quo warranto* are now considered as *civil* proceedings, *i. e.* to try a civil right, usually a corporate franchise, though of a public nature, (n) but still the proceedings are in the *Crown Office*, and consequently are here noticed.

It is no objection to the granting of an information in the nature of a *quo warranto*, that the person applying is in low and indigent circumstances, and that there is strong ground of suspicion that he is applying, not on his own account or at his own expense, but in collusion with a stranger; the Court, however, in a case of this kind required security for the costs. (o) Nor is it any objection that it is a friendly proceeding in order that the party might disclaim. (p) The jurisdiction, practice and costs in *quo warranto* will hereafter be fully considered.

Removal of
indictments and
presentments
from inferior
Courts.

A most important jurisdiction is exercised exclusively by this Court, in the removal of proceedings on indictments and presentments of justices or constables, or on coroner's inquests, into this Court, in order that the form and merits may be there discussed, prosecuted and tried. This is a common law jurisdiction, modified by statutes. A *certiorari* is a writ issuing out of this Court, under the chief justice's name, directed in the king's name to the judge or officer of an inferior Court, commanding them to certify or (in the more modern form) *send* the record or proceeding before them to the Court of King's Bench, in

(i) Per Bayley, J. in *R. v. Ogden*, 10 B. & C. 233.

(k) *Ante*, vol. i. 789, 790, 798, 799.

(l) *R. v. Trevenem*, 2 B. & Ald. 479; *R. v. Dawes*, 4 Burr. 2022.

(m) 2 Sellon, 619; Tidd, 949.

(n) Tidd, 595.

(o) *R. v. Wakelin*, 1 B. & Adol. 50; and see *R. v. Benney*, *id.* 684.

(p) *R. v. Marshall*, 2 Chit. R. 370.

order that the Court " may further cause to be done therein. what of right and according to law that Court should see fit to be done." And its use is, that the superior Court may consider and determine the validity of indictments, presentments, convictions, orders, &c. and the proceedings relating to the same, and to quash or confirm, or proceed to trial of the former, or to issue process of outlawry against the offender in those cases where the inferior Court could not reach him, (q) to have a trial by a special jury after a view and the assistance of a king's counsel. It would be foreign to our purpose to treat fully of this proceeding, and our observations will be merely for the purpose of shewing the practice in this Court, and principally on behalf of a defendant. This Court, we have seen, has only an *original* jurisdiction over criminal matters occurring in Middlesex, or where the Court when ambulatory happened to sit; but by *certiorari* any indictment, presentment, &c. found or presented in any part of England, may be removed into the King's Bench, after which the proceedings thereon are to be according to the course and practice of that Court.

Here it is to be observed as a *general rule*, that if the indictment or other proceedings was originally insufficient or was found by an improper Court or jury, the circumstance of its removal by *certiorari* into the King's Bench, and subsequent proceedings thereon, these will not get rid of the objections; and, therefore, where an indictment for *perjury* at common law was found at the *quarter sessions* and removed into this Court, and thence sent down to trial at the assizes, Mr. Justice Gaselee said, " that it was quite clear that the sessions had no jurisdiction over perjury at common law, and as the indictment was therefore void as found by an incompetent tribunal, he refused to try it." (r) Still, however, if a defendant has thus been prosecuted before an improper tribunal, it will be safer to remove the proceeding, and then apply to the Court of King's Bench to quash the same.

As respects the removal of *indictments* and presentments there are at common law and by statutes material distinctions as regards the *time* and *mode* of removal, for before verdict the removal is by *certiorari*, whereas after judgment below it is by writ of error. It is a general maxim, applicable to indictments as well as convictions, that at common law, before judgment, they are removable by *certiorari*, unless some very express enact-

(q) 4 Bla. Com. 321; Com. Dig. Certiorari; Bac. Ab. Certiorari; Hawk. b. ii. c. 27.

(r) R. v. Haynes, 1 Ryan & Moo. R. 298.

CHAP. V.
SECT. III.

ment has taken away the right to remove, (s) and even then if one count be introduced not affected by such express enactment the whole indictment is removable. (t) Formerly the removal of indictments by certiorari before judgment was of course, but such general liberty having, as the 5 W. & M. c. 11, (u) recites, been abused by persons "*fearing to be de-*

(s) And see in particular *R. v. Moreley*, 2 Burr. 1040; *R. v. Middlesex*, 8 Dowland & R. 117. (t) MS. *R. v. Saunders*, and 5 D. & R. 611.

(u) 5 W. & M. c. 11. "An Act to prevent Delays of Proceedings at the Quarter Sessions of the Peace," recites, "whereas it is experienced that notwithstanding the prior statutes made in the 21 James 1, c. 13 and 14, and 20 Car. 2, concerning the granting of writs of certiorari to remove indictments of riots, forcible entry, assault and battery, and other presentments and indictments, out of the Courts of the General or Quarter Sessions of the Peace in the counties or places wherein such indictments have been found, and proceedings thereupon recorded, into their majesty's Court of King's Bench, divers turbulent contentious, lewd and evil disposed persons, *fearing to be deservedly punished where they and their offences are well known*, have not only obtained writs of certiorari for removing such indictments found against them as aforesaid, but also indictments for sundry other trespasses, frauds, nuisances, contempts and misdemeanors after issue joined, and the prosecutors attending with their counsel and witnesses to try the same before the said justices of the peace in their said sessions, to the great discouragement of the prosecutors and of such constables and other officers as, according to their duty, present persons for those and such like trespasses, offences, and misdemeanors, for remedy whereof and that such offenders may be brought to condign punishment,

No certiorari to be granted but upon motion of counsel, and upon a rule granted in open Court;

and that before allowance of certiorari a recognizance by two sureties shall be acknowledged before justices.

Conditioned return of certiorari to appear and plead to the indictment or presentment, and at costs of prosecutor of certiorari, to cause the issue joined to be tried at next assizes;

such recognizance to be certified and returned with certiorari and indictment to King's Bench; otherwise the Court below

II. Be it enacted, That in term time no writ of certiorari whatever, at the prosecution of any party indicted, be hereafter granted, awarded or directed out of the said Court of King's Bench, to remove any such indictment or presentment of trespass or misdemeanor, before trial had, from before the said justices in the said Courts of General or Quarter Sessions of the Peace, unless such certiorari shall be granted or awarded upon motion of counsel and by rule of Court made for the granting thereof, before the judge or judges of the said Court of King's Bench sitting in open Court. And that all the parties indicted, prosecuting such certiorari, before the allowance thereof, shall find two sufficient manucaptors, who shall enter into a recognizance before one or more justices of the peace of the county or place in the sum of twenty pounds, with condition at the return of such writ to appear and plead to the said indictment or presentment in the said Court of King's Bench, and at his and their own costs and charges to cause and procure the issue that shall be joined upon the said indictment or presentment, or any plea relating thereunto, to be tried at the next assizes to be held for the county wherein the said indictment or presentment was found after such certiorari shall be returnable, if not in the cities of London, Westminster, or county of Middlesex, and if in the said cities or county, then to cause or procure it to be tried the next term after wherein such certiorari shall be granted, or at the sitting after the said term, if the Court of King's Bench shall not appoint any other time for the trial thereof, and if any other time shall be appointed by the Court, then at such other time, and to give due notice of such trial to the prosecutor or his clerk in Court; and that the said recognizance and recognizances, taken as aforesaid, shall be certified into the said Court of King's Bench, with the said certiorari and indictment, to be there filed, and the name of the prosecutor (if he be the party grieved or injured,) or some public officer, to be indorsed on the back of the said indictment; and if the person prosecuting such certiorari, being the defendant, shall not, before allowance thereof, procure such manucaptors to be bound in a recognizance as aforesaid, the justices of the peace may and shall proceed to trial of the said indictment at the said sessions, notwithstanding such writ of certiorari so delivered.

III. That if the defendant prosecuting such writ of certiorari be convicted of the offence for which he was indicted, that then the said Court of King's Bench shall give reasonable costs to the prosecutor if he be the party grieved or injured, or be a justice of the peace, mayor, bailiff, constable, headborough, tythingman, churchwarden or overseer of the poor, or any other civil officer who shall prosecute upon the account of any fact committed or done that concerned him or them, as officer or officers, to prosecute or present which costs shall be taxed according to the course of the said Court, and that the prosecutor, for the recovery of such costs, shall, within ten days after demand made of the defendant and refusal of payment, on oath, have an attachment granted

servedly punished where they and their offences are well known," viz. at the sessions or quarter sessions near the place of the offence, that act enacts that in term time no writ of certiorari at the instance of the party prosecuted shall be granted out of King's Bench, to remove any indictment or presentment of *trespass or misdemeanor*, before a trial had, from before the justices of sessions, unless such certiorari shall be granted upon *motion* of counsel, and by *rule* of court made for granting thereof; and that before allowance of the certiorari by the Court below, there shall be a recognizance with two sureties, acknowledged before one justice. in £20, conditioned for the defendant's, at return of the certiorari, appearing and pleading in King's Bench to the indictment or presentment, and causing the issue joined to be tried at the next assizes, and that such

against the defendant by the said Court for such his contempt, and that the said recognizance shall not be discharged till the costs so taxed shall be paid.

IV. Enacts, That in any of the vacations, writs of certiorari may be granted by any of the justices of their majesty's Court of King's Bench, whose names shall be indorsed on the said writ, and also the name of such person at whose instance the same is granted; and that the party or parties indicted prosecuting such certiorari, shall, before the allowance of such writ or writs of certiorari, find such sureties in such sum, and with such conditions as are before mentioned and specified in this present act.

V. Enacts, That upon every certiorari granted or awarded within the counties palatine of Chester, Lancaster or Durham, to remove indictments or presentments for any of the matters aforementioned, all the parties indicted prosecuting such certiorari shall find such sureties to be bound in such sums, and with such respective conditions, and at his or their own costs and charges, shall cause and procure the issue joined upon the said indictments or presentments to be tried at the next assizes or general gaol delivery, to be held for the said respective counties, and shall give like notice to the prosecutor, and if convicted shall be liable to like costs, to be taxed, as is by this act provided for in cases where the same are granted or awarded out of the Court of King's Bench at Westminster.

VI. Provides and enacts, That if any indictment or presentment be against any person or persons for not repairing of any *highways*, causeways, pavements or bridges, and the right or title to repair the same may come in question, upon such suggestion and affidavit made of the truth thereof, a certiorari may be granted to remove the same into the Court of King's Bench, any law or statute to the contrary in any wise notwithstanding. Provided nevertheless, that the party or parties prosecuting such certiorari, shall find two manucaptors to be bound in a recognizance with conditions as aforesaid. [Rendered perpetual by 8 & 9 W. 3, c. 33.]

The 8 & 9 W. 3, c. 33, s. 1, renders perpetual 5 W. & M. c. 11, sect. 2. and for the making the purpose and design of the said act more effectual, enacts, that the party or parties prosecuting any certiorari to remove any indictment or presentment from the quarter or general sessions of the peace, may find two sufficient manucaptors, who shall enter into a recognizance before any one of his majesty's justices of the Court of King's Bench, in the same sum and under the same condition as is required by the said act, whereof mention shall be made on the back of such writ, under the hand of the justice taking the same, which shall be as effectual and available to all intents and purposes to stay or supersede any further proceedings upon any indictment or presentment, for the removal of which the said writ of certiorari shall be granted, as if the recognizance had been taken before any one of the justices of the peace of the county or place where such indictment was found or presentment made, and also it shall be added to the condition of every recognizance taken by virtue of this and the said act, that the party or parties prosecuting such writ of certiorari shall appear from day to day in the said Court of King's Bench, and not depart until he or they shall be discharged by the said Court.

certiorari may be before a judge of King's Bench in same sum as required by 5 W. & M. c. 11; but in addition to the terms of the recognizance, the condition is to be for the party defending appearing in King's Bench from day to day in Court.

may proceed to try the indictment.

In case defendant be convicted, King's Bench to give costs to prosecutor, if the party grieved, or public officer, &c.

And attachment issue for such costs.

In vacation a judge of King's Bench may grant a certiorari and the like recognizance required.

Certiorari in counties palatine of Chester, Lancaster or Durham.

Certiorari to remove indictment or presentment for not repairing highways, bridges, &c., in case the obligation to repair should come in question.

That the recognizance for cer-

CHAP. V.
SECT. III.

recognizance shall be certified and returned with the certiorari and indictment into the King's Bench; and that if such recognizance be not acknowledged the Court below shall proceed to try the indictment. The 3d section enacts that if the defendant be convicted the Court of King's Bench may give reasonable costs to the prosecutor if he be a party aggrieved, or a justice or officer prosecuting in respect of his office, and that an attachment shall issue in case such costs be not paid. The 5th section authorizes a judge to issue a certiorari in vacation, but the like recognizance is to be acknowledged before it be allowed. The 6th section authorizes the removal of indictments and presentments for not repairing a highway or bridge, upon affidavit that the right or title to repair the same may come in question. The 9 & 10 W. 3, c. 33, s. 1, renders perpetual this act, and enacts that the recognizance may be acknowledged before a judge of King's Bench, but with the additional stipulation that the defendant shall appear from day to day in the Court of King's Bench, and not depart until discharged by that Court.

As these acts require in term time a motion and rule, and in vacation the permission of a judge, to issue a writ of certiorari, it is obvious that it is no longer of right or as a mere matter of course that an indictment or presentment can be removed at the instance of the defendant. And to support his application there must be an *affidavit* entitled only "in the King's Bench," (x) shewing facts or circumstances sufficient to induce the Court or a judge to allow the writ. In general it will be granted on an affidavit shewing that there are or that the deponent has been advised by counsel that it is expected and believed that upon the trial matters of law and of doubtful decision and unfit to be decided by the inferior Court will arise, sometimes shewing the particular point, or that some of the justices at sessions are interested; (y) and any even slight ground for doubting a satisfactory trial or judgment below will in general induce the Court to grant the writ.

The statute 13 G. 2, c. 18, s. 5, relative to the time within which a certiorari for removing a conviction or order must be obtained, does not extend to indictments or presentments, (z) nor is there required any notice of the intended application. The *motion of* counsel should be made before issue joined and at the earliest opportunity, and at all events before conviction

(x) 1 B. & Cres. 267.

(y) 2 T. R. 89; 1 East, 303; 1 Ken-

yon's R. 135; Hand's Prac. 38, 352.

(z) R. v. Battams, 1 East, 208.

or judgment; (a) and if there be several defendants it must appear, by affidavit or by counsel for each defendant appearing, that all concur in the application. (b) The application may be made after a warrant has issued and recognizance to appear, even before indictment found; (c) and whenever a defendant is under a recognizance to appear at sessions to answer any indictment there preferred, if he fear that he would not there receive an impartial trial or proper judgment, he should *immediately* apply to the Court of King's Bench or a judge, on a full affidavit, to remove the recognizance and stay all proceedings, so as to secure a trial upon an indictment only at the assizes before one of the judges. (d) When the propriety of the removal, even upon the *ex parte* application of the defendant, appears clear, then the Court or judge will at once grant the writ and not a new rule nisi (to shew cause), which would increase the expense; though it seems that there must be a rule nisi before the removal by certiorari of proceedings before commissioners of sewers. (e) If there be an indictment to be removed, and the party be in custody and desire his removal to another prison, or to be bailed, there must also be an habeas corpus as well as the certiorari, for otherwise he must continue in the former prison. (f) After the Court has granted the writ of certiorari, in order to render it effectual the party should immediately follow it up and enter into the required recognizances each in £50, and a recognizance with two sureties each in £25 is not a compliance with the act. (g)

The great advantage and indeed real object of a removal by certiorari is, that the defendant thereby not only retains the right to object to the form of indictment and other proceedings, but he claims a complete investigation of the merits in the superior Court, or at least before one of the judges on the circuit; whereas, upon a removal of an indictment or presentment by writ of error, then only the *form* of the indictment, caption, and other proceedings upon the face of the record, and not the merits, can be questioned. (h) The trial may also be by special jury, who may have a view, and the defendant may have the assistance of king's counsel. The Court and the judge who tries the cause usually disapprove of the conduct of a defendant or prosecutor in removing an indict-

(a) *R. v. Pennegoes Mackynlleth*, 1 B. & C. 142; Hawk. b. 2, ch. 27, s. 30; 4 Bla. C. 321.

(b) *R. v. Hunt*, 2 Chitt. R. 130.

(c) MS. 60 G. 3, and 1 G. 4, c. 4, s. 4.

(d) In Oct. A.D. 1835, *R. v. Valentine*, a clergyman apprehended on a charge of unnatural practices, and under recogni-

zances to appear at sessions, Mr. Justice J. Parke granted a certiorari; and afterwards, at the assizes for Sussex, he was indicted and acquitted.

(e) 2 Chitt. R. 137, *post*, 380.

(f) *R. v. Thomas*, 4 M. & S. 442.

(g) *R. v. Dunn*, 8 T. R. 217.

(h) *R. v. Mackynlleth*, 1 B. & C. 142.

CHAP. V.
SECT. III.Removal by
writ of error.

ment for a common assault or trifling offence, on account of his thereby greatly increasing the expenses.

After *judgment* of an inferior Court upon an indictment or presentment, or coroner's inquest, &c. tried by a jury, the removal cannot be by *certiorari*, but must be by *writ of error*, upon which, we have seen, the *merits* cannot be discussed; (i) and such a writ of error must in all cases be returnable in the Court of King's Bench, (k) and there, after issue joined in error, the case is argued in full Court. But the attorney-general's *fiat* or authority for the issuing of such writ must be first obtained; (l) and though it is usually granted upon the production of a petition and a case with counsel's opinion or certificate that there is ground of error; yet sometimes the attorney-general, before granting his *fiat*, will require the prisoner's counsel to attend before him and state his objections and authorities in support of them. Where, however, there is reasonable doubt as to the sufficiency of the indictment or proceedings, it is not usual to refuse the *fiat*.

Coroner's in-
quests, &c.

Although no party in particular be interested, yet as the king has an interest in the general administration of justice, and to prevent any abuse of the law standing as a precedent, the Court, on the application of the attorney-general, may by *certiorari* move and set aside a *coroner's inquisition* for apparent defect, and may declare a rule for that purpose absolute even in the first instance. (m) But this Court has no jurisdiction to try an indictment *for perjury* at common law, found at *the sessions* and removed by *certiorari* into the King's Bench, an indictment so found being void, as an indictment for perjury, excepting when founded on the statute of Elizabeth, can only be prosecuted in the Court of King's Bench or at the assizes, and a bill even cannot be found by a grand jury at sessions. (n)

Of *certiorari* to
remove convic-
tions, orders,
&c.

It is a legal maxim that all *judicial* proceedings of justices of the peace, upon which they have decided by *conviction* or *order*, (such as an *illegal conviction* under the Building Act, or an *illegal order of justices* for turning an highway, (o)) and whether at general or special sessions, or individually, and either by general or particular statute, are of *common right removeable into this Court by certiorari*, unless that remedy has

(i) *Ante*, 373.(k) *Evans v. Roberts*, 3 Salk. 147; *Cornhill's case*, 1 Lev. 149; 1 Sid. 208, S. C.; Tidd, 1137.(l) *R. v. Wilkes*, 4 Burr. 2534, 2550; Hawk. b. 2, c. 50, s. 13; Hand's Prac. 48, 50, 462, 487; Tidd, 1141.(m) *In re Culley*, 5 B. & Adol. 230.(n) Per Gaselee, J., *R. v. Haynes*, 1 Ry. & M. 298; and see Hawk. P. C. b. 2, c. 8, s. 64; *R. v. Bainton*, 2 Stra. 1088; *Reg. v. Smith*, 2 Ld. Raym. 1144; *Reg. v. Yarrington*, 1 Salk. 406.(o) *R. v. Kent*, 10 B. & Cress. 477.

been *expressly taken away* by particular enactment; (*p*) and even where a statute declared that no other Court whatever should intermeddle with any *causes of appeal* upon that act, but that they should be *finally determined* in the quarter sessions only; yet it was decided that the Court of King's Bench was not ousted of its jurisdiction by certiorari, because the Court considered that such terms of enactment merely meant that the *facts* should not be examined. (*q*) On the other hand, an appeal (which is in the nature of a *new trial*, or reinvestigation of the *facts and merits*,) can never be sustained, unless it has been *expressly given* by some statute. (*r*) This writ, however, is for the removal of *judicial* acts, and not those merely *ministerial*, and therefore neither a mere order of Court, not constituting a final decision, nor a warrant of a justice, nor a recognizance, are so removeable. (*s*) And it has been the practice in the King's Bench not to grant a certiorari to remove an order of justices, from which an appeal lies to sessions, before the matter has been determined upon appeal, because the removal might take away that privilege, but when there is no restriction as to the time of appeal, it would be otherwise. (*t*)

The Court of King's Bench cannot take cognizance of or exercise their controuling jurisdiction over convictions, &c., unless they have been regularly brought before them *by writ of certiorari*, and where by inadvertence, the enactment presently stated had been disregarded, and a certiorari had not been issued within the six calendar months from the last preceding order or confirmation of a conviction, the Court had no jurisdiction, although in continuance of a former proceeding intended by them to be finally decided. (*u*) The certiorari to remove a conviction or order is in effect a writ of error, for the *facts* or

(*p*) *Ante* this volume 219, 220, 139, 142; *R. v. Moreley*, 2 Burr. 1040; *R. v. Jukes*, 8 T. R. 544; *R. v. Cashibury*, 3 Dowl. & Ry. 35; *R. v. Saunders*, 5 Dowl. & Ry. 611; 2 Sellon's Pr. 618; *R. v. Middlessex*, 8 Dowl. & Ry. 117; Burn's Jus. tit. *Certiorari*.

(*q*) *R. v. Moreley*, 2 Burr. 1040; *R. v. Jukes*, 8 T. R. 542; Hawk. b. 2, c. 27, s. 23; what words take away the writ, *R. v. Middlessex*, 8 Dowl. & Ry. 117.

(*r*) *Ante* this volume, 215; *R. v. Surrey*, 2 T. R. 509; *R. v. Oxfordshire*, 1 M. & S. 448; *R. v. Hanson*, 4 B. & Ald. 521; *R. v. Cumberland*, 1 B. & Cres. 64.

(*s*) *R. v. Lloyd*, Cald. 309; Sayer, 6; Loft, 329.

(*t*) Salk. 147; Cald. 172.

(*u*) *R. v. Super*, 1 M. & S. 631; *ante*, 221; and *R. v. Smith*, King's Bench,

1834. A conviction under 5 G. 4, c. 83, s. 3, of defendant for deserting his wife, &c., was appealed against and quashed by sessions, Warwickshire, subject to a case to Court of King's Bench, granted on application of convicting justice, who thereupon removed proceedings into the King's Bench by certiorari, issued on his behalf. Court of King's Bench sent case back to sessions to be restated. Sessions, on argument, came to a different decision, and *affirmed* conviction, subject to a case; on argument of which, on 8th May, 1834, the King's Bench held that *defendant* should have obtained a fresh *certiorari*, and for want of it they had no jurisdiction, and it being too late under the statute to issue such certiorari, the defendant was fixed.

CHAP. V.
SECT. III.

merits upon which the proceeding took place, cannot be discussed in the Court above, but merely the form and sufficiency of the proceeding as appear upon the face of them. (x) When the sessions on an appeal quashed a conviction for a supposed defect in form, without hearing the merits, the Court of King's Bench quashed the order of sessions, and sent back the case to the sessions to enter continuances and hear the appeal on the merits. (y)

Quære, if any remedy when certiorari taken away.

If the writ of certiorari has been expressly taken away by statute, and the conviction or proceeding be so formally correct on the face of it, as to afford an answer to any action of trespass, but yet was made under such strong circumstances of fraud or partiality as to render it unjust on the *merits* that it should be enforced, then *perhaps* on full affidavits and motion the Court of King's Bench might, by writ of *prohibition* or rule, *stay* the justice from proceeding to execution upon such unjust proceeding. (z)

Regulation of certiorari to remove convictions and orders.

In order to restrain the vexatious removal of convictions and orders, which issued as of course at common law, the statute 5 G. 2, c. 19; and 13 G. 2, c. 18, have been enacted, and which now regulate the proceeding. (a) The first act, sect. 1, after

(x) *R. v. Jukes*, 8 T. R. 542; *R. v. Liston*, 5 T. R. 358.

(y) *R. v. Ridgway*, 5 B. & Ald. 527.

(z) 2 Ld. Raym. 901; *Crepps v. Denden*, Cowp. 640; 1 B. & Adol. 386(a); *ante* this volume, 220, 221, *sed quære*, as to any jurisdiction of K. B.

against an express enactment that the conviction should not be in any manner reheard, &c. Where, however, a justice or an inferior Court had *no jurisdiction*, then in order to quash a conviction, such a proceeding may be proper. *R. v. Justices of Somersetshire*, 3 Dowl. & Ry. Mag. Cas. 273.

(a) 5 G. 2, c. 19, s. 1, gives justices of the peace power to *amend judgments* and orders in matters of form upon appeal.

No certiorari to be allowed to remove justice's orders, without a recognizance of 50*l.* to prosecute to effect.

Sect. 2 is thus: And whereas divers writs of *certiorari* have been procured to remove such judgments or orders (said to be confined to judgments or orders mentioned in first section, where an appeal is given. *R. v. Dunn*, 8 T. R. 218, *sed quære*,) into his majesty's Court of King's Bench at Westminster, in hopes thereby to discourage and weary out the parties concerned in such judgments or orders, by great delays and expenses, enacts, that *no certiorari* shall be allowed to remove any such judgment or order, unless the party or parties prosecuting such certiorari, before the allowance thereof, shall enter into a *recognizance*, with sufficient sureties, before one or more justices of the peace of the county or place, or before the justices at their general quarter sessions or general sessions, where such judgment or order shall have been given or made, or before any one of his majesty's justices of the said Court of King's Bench, in the sum of fifty pounds, with condition to prosecute the same at his or their own costs and charges with effect, without any wilful or affected delay, and to pay the party or parties in whose favour and for whose benefit such judgment or order was given or made, within one month after the said judgment or order shall be confirmed, their full costs and charges, to be taxed according to the course of the Court, where such judgments or orders shall be confirmed; and in case the party or parties prosecuting such certiorari shall not enter into such recognizance, or shall not perform the conditions aforesaid, it shall and may be lawful for the said justices to proceed and make such further order or orders for the benefit of the party or parties to whom such judgment shall be given in such manner as if no certiorari had been granted.

On refusal of recognizance, justices to proceed.

Recognizances to be certified into the King's Bench.

Sect. 3 enacts, That the *recognizance* and recognizances to be taken as aforesaid shall be *certified* into the Court of King's Bench at Westminster, and there filed with the certiorari and order or judgment removed thereby, and if the said order or judgment shall be confirmed by the said Court, the persons entitled to such costs for the

reciting the vexatious defeats on appeal to the sessions on mere defects of form, enables the sessions to amend them; and sect. 2 reciting that writs of certiorari have been procured to remove *judgments or orders* of justices of the peace, in hopes thereby to discourage and weary out the parties concerned by great delays and expenses, enacts that no certiorari shall be *allowed* to remove any such judgment or order, unless the party prosecuting such certiorari, before the allowance thereof, shall enter into a recognizance, with sufficient sureties, before a justice of the peace or justice of sessions, or before a judge of the King's Bench, in 50%, conditioned to prosecute such certiorari with effect and without delay at his own cost, and to pay full costs, if the judgment or order shall be confirmed; and unless such recognizance be executed, the justices are to proceed and enforce the judgment or order; and sect. 3 directs that the recognizance shall be certified and filed with the certiorari and judgment or order thereby removed in the King's Bench, and if confirmed, the payment of costs is to be enforced by attachment.

The 13 G. 2, c. 18, s. 5, extends in terms to *all* convictions, judgments, orders, and other proceedings before justices, and prohibits any certiorari, unless applied for within six calendar months next after conviction, &c., reckoned from the date of the conviction, &c., (*b*) and six days' previous notice of the intended motion for the certiorari must be served on the justices, or two of them, so as to enable them to shew cause in the first instance, (*c*) and such notice must state the name of the party or parties intending to apply for the writ, (*d*) and all the parties

recovery thereof, within ten days after demand made of the person or persons who ought to pay the said costs, upon oath made of the making such demand and refusal of payment thereof, shall have an attachment granted against him or them by the said Court for such contempt, and the said recognizance so given upon the allowing of such certiorari shall not be discharged until the costs shall be paid, and the order so confirmed shall be complied with and obeyed.

Attachment for contempt.

13 G. 2, c. 18, s. 5. And for the better preventing vexatious delays and expense occasioned by suing forth writs of certiorari for the removal of convictions, judgments, orders, and other proceedings before justices of the peace, it is enacted, That no writ of certiorari shall be granted, issued forth or allowed, to remove any *conviction, judgment, order, or other proceedings*, had or made before any justice or *justices of the peace* of any county, city, borough, town corporate or liberty, or the respective general or quarter *sessions thereof*, unless such certiorari be moved or applied for within *six calendar months* next after such conviction, judgment, order, or other proceedings, shall be so had or made, and unless it be duly proved upon oath that the said party or parties suing forth the same hath or have given *six days' notice thereof in writing to the justice or justices, or to two of them*, (if so many there be,) by and before whom such conviction, judgment, order, or other proceedings, shall be so had or made, to the end that such justice or justices, or the parties therein concerned, may show cause, if he or they shall so think fit, against the issuing or granting such *certiorari*. All the parties must respectively sign the notice. 3 B. & Adol. 887; see also 60 G. 3; 1 G. 4, c. 4, s. 3 & 4; and see the notes Chitty's Col. Stat. 132, 133.

Certiorari, when and how to be applied for, viz. within six months, and after six days' previous written notice.

(*b*) *R. v. Boughey*, 4 T. R. 281; *R. v. Sussex*, 1 M. & S. 631, 734; *R. v. Kayle*, 1 Dowl. & R. 436; Lofft, 544. (*c*) *R. v. Glamorganshire*, 5 T. R. 279. (*d*) *R. v. Lancashire*, 4 B. & Ald. 289.

CHAP. V.
SECT. III.

The practice.

must respectively sign such notice, (e) and not merely an attorney or agent for them. (f)

In practice, after a conviction or order has been made or affirmed on appeal, application should be made to the justice or justices for a copy, and if from such copy it appear that the evidence and defence have not been duly set forth according to the facts, the magistrate should be required to correct his conviction; and if he should refuse, the facts should be fully stated in the subsequent affidavit in support of the motion to the Court of King's Bench. If the immediate payment of the penalty or fine be insisted on, and especially if a warrant has been issued, the same may be paid under protest. Then, before a motion for a certiorari directed to the convicting magistrate, it may be advisable to search and ascertain whether he has returned his formal conviction to the sessions, and examine the same there, if so filed. (g) Then a *written notice of motion* for certiorari should be carefully prepared, addressed to all the convicting justices by name, or at least two of them, referring to the conviction or order, and shortly stating with particularity the grounds of objection to the same, (so as to enable the justices to prepare to shew cause on affidavits in the first instance, (h)) the names and addition of the party objecting, and who will apply to the Court on a named day, or so soon after as counsel can be heard, and also naming the person or persons to whom the writ will be prayed to be issued. The notice must be signed by all the complaining parties, and not by one for himself and copartners, nor by an attorney or agent. (i)

The notice must be *served* full six days exclusive before the day when the motion to the Court is to be made, and it would be safer to serve at least two of the justices *personally*, (k) and from the concluding words of 13 G. 2, c. 18, s. 5, it would seem safer also to deliver a copy of the notice also, addressed to the prosecutor and parties concerned.

There must be an *affidavit*, entitled at most, "In the King's Bench," annexing and verifying a copy of the notice served, and stating the time and place and mode of service. (l)

An *affidavit* of the time of the conviction, and objectionable proceedings before the magistrate, the request to him to hear and state on his conviction the defence and evidence, and when the

(e) *R. v. Cambridgeshire*, 3 B. & Adol. 887; and see 60 G. 3 and 1 G. 4, c. 4.

(f) *Semble*, *id.*

(g) *R. v. Eaton*, 2 T. R. 285.

(h) *Per Cur. R. v. Lancashire*, 4 B. & Ald. 289.

(i) *R. v. Cambridgeshire*, 3 B. & Adol.

887. The form in 1 Barn J., tit. Certiorari, p. 592, therefore, seems defective. See a form, *ante*, 223, this volume.

(k) *Ante*, 177, this vol.

(l) *Ex parte Nohro*, 1 B. & Cres. 267; see form of *affidavit*, *ante*, 224, note (k), this volume.

fact, his refusal also, the subsequent request to him to amend his conviction in that respect, also all the particular objections, either to the irregularity of the proceeding or to the form of the conviction obtained from the justice, which should be verified and produced in court and referred to as annexed.

The *motion*, or application for the writ, must be made by counsel, within the prescribed time of six calendar months from the date of the order, or *time* of conviction, or order of confirmation at sessions on appeal, without regard to any delay in drawing up the conviction, or stating a case at the sessions for the opinion of the Court. (*m*)

The motion should be as well for a *certiorari* to remove the principal conviction or order, as also the original information, summons, warrants, and other proceedings and documents, and if the magistrate refused to set out the defence or evidence, a *mandamus* to compel him to set out and return the same, in his returned conviction, or shew cause to the contrary, may at the same time be prayed, and this is in general necessary. (*n*)

Although the statutes relating to *sewers*, and the jurisdiction of the commissioners, viz. 27 Hen. 8, c. 5, 2 W. & M. c. 8, s. 2, 7 Anne, c. 9, 7 Anne, c. 10, 18 G. 3, c. 16, 47 G. 3, c. 7, local and personal, and another local act for Westminster, passed 20th April, 1812, 7 G. 4, c. 64, s. 18, and 3 W. 4, c. 22, are silent on the subject of *appeal* or *certiorari* to the Court of King's Bench, yet as a part of its superintending power over most inferior Courts, this Court may, upon motion, supported by affidavit and by writ of *certiorari*, remove the proceedings of a *Court of Sewers*, and determine upon their legality, (*o*) as by examining the validity of a sewer's rate. (*p*) And it is frequently proper to proceed in King's Bench by *certiorari*, for a Court of Equity will not restrain the commissioners in proceeding to remove a float or tumbling bay upon a river, although it be suggested that it will be attended with irreparable mischief; (*q*) and though a Court of Equity has coextensive jurisdiction in some respects, yet an injunction against the commissioners of sewers reducing the height of water in a river, was dissolved on the ground that there was a shorter

Removal of
proceedings
before commis-
sioners of
sewers.

(*m*) *R. v. Sussex*, 1 Maul. & S. 734, 631; *R. v. Kaye*, 1 D. & R. 436; 4 T. R. 281; *R. v. Howlet*, 1 Wils. 35.

(*n*) *R. v. Marsh*, 4 D. & R. 264; *R. v. Rix*, *ibid.* 352; *ante*, this vol. 218.

(*o*) 3 Bla. Com. 55, 73, 74; Callis on Sewers; Com. Dig. tit. Sewers; Bac. Ab. tit. Courts of Commissioners of Sewers; Chit. Col. Stat. tit. Sewers, 879

to 887; *R. v. Commissioners of Sewers for Tower Hamlets*, 1 B. & Adol. 232.

(*p*) *R. v. Commissioners of Tower Hamlets*, 9 B. & Cres. 517; and 1 B. & Adol. 232.

(*q*) Cowp. Ch. Ca. 305; Vesey & Beames; Bac. Ab. Courts of Commissioners of Sewers.

CHAP. V.
SECT. III.

remedy in the Court of King's Bench, who interfere with great caution. (q) The course of proceeding to obtain the opinion of the King's Bench on the validity of a sewer's rate, is to make affidavits of the facts and objections to the rate, and thereupon move the Court for a rule to shew cause why a writ of certiorari should not issue, directed to the commissioners, to remove the objectionable proceedings into this Court, in order that the same may be quashed, stating the several grounds of objection in the rule nisi. The commissioners then make affidavits in answer and shew cause, and after argument the Court decide upon the rule nisi before any writ of certiorari is issued. (r) We have seen that in some cases a certiorari is granted in the first instance, but there must be a rule nisi in the first instance for a certiorari to remove proceedings from before the commissioners of sewers. (s) In general, in case of a presentment by a jury that a party is benefited by the sewers when he was not in fact so benefited, he should traverse the presentment, for if he neglect to do so, and a distress be levied, he could not sue the commissioners. (t) But in general an assessment upon a party who does not benefit will be void, and trespass for levying the rate would be sustainable. (u) In general, however, the safest course, when any objection to the commissioners' proceedings can be established by examination of them, is to move for a certiorari to remove them into the King's Bench, and move to quash them quia timet, so as to anticipate and prevent any injury. (x)

Jurisdiction
upon cases
stated by Courts
of Sessions for
the opinion of
the Court rela-
tive to poor
rates and assess-
ments, settle-
ments, and or-
ders of re-
moval, &c. (y)

Another very extensive and exclusive branch of jurisdiction, occupying much of the time of the Court, relates to the hearing and determining of *cases stated by Courts of Sessions*, upon appeals to them, *usually upon the validity of poor rates*, (z) or particular *assessments* therein, or upon a question of *parochial settlement*, and the validity of an *order of removal*; (a) but though cases are more usually granted or stated upon questions of parochial settlement or rating, they may be granted in all cases of *orders* and *convictions*, where the certiorari is not expressly taken away by statute. (b) Whenever the sessions

(q) *Kerrison v. Sparrow*, 19 Ves. 449; *Box v. Allen*, Dick. 49.

(r) *R. v. Commissioners of Sewers of Tower Hamlets*, 1 B. & Adol. 232.

(s) 2 Chitty's R. 137; ante, 373.

(t) *Warren v. Dix*, 3 Car. & P. 71.

(u) *Masters v. Seroggs*, 3 M. & S. 447.

(x) *Birket v. Croyier*, 3 Car. & P. 63; 1 M. & M. 119; and see other cases, Burn J., tit. Sewers.

(y) Anciently it was the practice to

state the facts especially in the order of sessions, and then refer them to the judges on the circuit, who had then more time than at present to consider them, Burn J., tit. Poor, 787.

(z) *R. v. Blackwater*, 10 B. & Cres 792.

(a) See in general Burn's J., tit. Poor, vi.; of Removal, 786 to 790.

(b) *R. v. Allen*, 15 East, 333.

upon appeal to them on these subjects, entertain a doubt upon the law as applicable to the facts disclosed upon the hearing of the appeal, they usually authorize the party against whom they decide to have their judgment reviewed by the Court of King's Bench, and this is called *granting a Case*. The justices at sessions are *not*, strictly speaking, *bound* to adopt this course, and ought not to do so when they are unanimous, and the point is free from doubt; and indeed in that case they *ought to refuse* a case, in order to prevent the delay and expense of further litigation. (c) But when there is reasonable doubt, they ought to raise a disputable question, in order that it may be decided by a higher tribunal, as well for the purposes of justice in the individual case, as also regarding precedent. (d) As, however, no bill of exceptions can be tendered with effect to the judgment of the justices, if they should peremptorily refuse a case, there is no remedy, even though perversely refused. (e) If the sessions have agreed to a case, then a mandamus may be issued to compel them to state it accordingly, unless it should appear that they have since so disagreed on the terms of the case itself, on account of some facts being in dispute, as to be unable to come to a conclusion on the facts themselves. (f)

When a case has been granted, either on a poor rate assessment, (g) or relative to a parochial settlement or order of removal, (h) it must be removed by certiorari into the Court of King's Bench, and if sent back to the sessions to be restated, must also be again removed by certiorari, or cannot be heard. (i)

But this Court will not take cognizance of a special case reserved upon the trial of an *indictment* at sessions, who are bound there finally to dispose of the prosecution, and have no power to delegate the decision on law or fact to this Court. (k) Nor has this Court any jurisdiction to review the judgment or decision of the quarter sessions, except on a case sent up

(c) *R. v. Darley Abbey*, 14 East, 285; Burn's J., Sessions of Peace, vol. v. 480. At the Middlesex Intermediate Sessions, on an appeal by Sir G. Acklam, Appellant, v. *The Trustees of St. Luke's Parish, Chelsea, Respondents*, 20th June, 1833, after hearing Bodkin for the Trustees and Clarkson for the Appellant, Mr. Broughton, the Chairman, (in answer to an application by Mr. Bodkin that a case might be allowed for the consideration and determination of the Court of King's Bench,) said it was not usual to grant a case when all the magistrates on the Bench were unanimous, and a case was refused.

(d) *R. v. Preston upon Hill*, Burr. Set. Cas. 77.

(e) *Ibid.*; *R. v. Oulton*, Burr. Set. Cas. 64; 1 Vent. 300.

(f) *R. v. Pembrokeshire*, 2 B. & Adol. 391; ante, vol. i. 793.

(g) *R. v. Oxford Canal Company*, 10 B. & Cres. 163; *R. v. Inhabitants of Barnes*, 1 B. & Adol. 113.

(h) Burn's J., tit. Poor, 786.

(i) *R. v. Sussex*, 1 M. & S. 631; and *R. v. Smith*, K. B. 1834; ante, 375, n. (u).

(k) *R. v. Inhabitants of Salop*, 13 East, 95.

CHAP. V.
SECT. III.

formally for their consideration. And therefore where the sessions, on an appeal, having heard the witnesses on one side, refused to hear those on the other side, on the ground that their testimony had been prefaced by observations on the part of counsel, contrary to their practice, the Court refused to grant a mandamus to rehear the appeal. (l) But it has been usual to reserve special cases upon *convictions* for penalties on an appeal to the sessions, when the certiorari or removal is not expressly taken away, as well as in cases of settlement; and the Court will take cognizance of this when accompanying the proceedings removed by certiorari into the King's Bench. (m) When one question only has on the face of the case been distinctly submitted to this Court, no other point will be considered, however apparent it may be on the facts stated. (n)

We have seen that anciently the judges on *their circuits* received cases from the sessions and decided upon them; but that practice has long been disused, in consequence of the great increase on the circuits of more important business. (o)

SECT. IV.

The constitution
and jurisdiction
of the Court of
Common Pleas.

SECT. IV.—*Of the Court of Common Pleas.*

We have seen that in the original formation or division of the Superior Courts it was intended that (with but very few exceptions) *all civil suits between subjects*, viz. *all real and mixed and personal actions*, should be instituted in this Court, and that only *criminal matters* should be prosecuted in the *King's Bench* and *revenue cases* in the *Exchequer*; that therefore Magna Charta enacted "Common Pleas shall not follow our Court (*i. e.* King's Bench), but be holden in a certain place." And the statute of Rutland enacted, that "no plea shall be held in the Exchequer, unless it specially concern the king or his ministers." But by the invention of the *latitat* in the King's Bench and the *quo minus* in the Exchequer, those two Courts assumed and ultimately established concurrent jurisdiction as respects personal actions, and also one mixed action, that of Ejectment. (p)

Real actions.

But we have seen that neither the Court of King's Bench

(l) *R. v. J. of Carnarvon*, 4 B. & Ald. 36; and *R. v. J. of Essex*, 2 Chitt. R. 385, *sed quære*.

(m) Tidd, 898, 899; *R. v. Allen*, 15 East, 333, 345; *R. v. Guildford*, 2 Chitt. R. 284.

(n) *R. v. Guildford*, 2 Chitt. R. 284;

sed quære.

(o) *Ante*, 362; Burn's J., tit. Poor, vol. iv. 786; *ibid.* tit. Sessions of Peace, vol. v. 480.

(p) 2 Sellon's App. 620, 642; Bac. Ab. Court of King's Bench, A. 2, and *Id.* tit. Court of Common Pleas.

nor Exchequer has any jurisdiction over *real actions*, so that if such an action were commenced therein, the whole proceeding would be void and coram non; (q) and the Court of *Common Pleas* has exclusive jurisdiction over them, (r) excepting that the king has by prerogative a right to sue *his* real or mixed action in any Court. (s)

So whilst *finer and recoveries* were in force, and still for many years to a certain extent, the practice relative to them, or rather limited to the *amendment* thereof, will be exclusively confined to this Court. (t) And the 1 W. 4, c. 70, s. 14 & 27, transferred the jurisdiction of the Courts of Great Sessions in Wales as to fines and recoveries, and the power of amending them, to this Court. And where the officer of the Court of Great Sessions had omitted to enter of record a recovery duly suffered there at bar in 1804, the Court of Common Pleas at Westminster ordered it to be done nunc pro tunc, under the 27th section of that act, on the ground that the power to *amend* implied such power to record. (u) And although the 3 & 4 W. 4, c. 74, s. 2, (x) enacts, that after the 31st December, 1833, no fine or recovery shall be levied or suffered, yet the 9th section saves and preserves the jurisdiction of this Court to amend any fine or recovery or any proceeding thereon. The act then substitutes more simple modes of assurance, and the 76th section empowers the Court of Common Pleas to make orders respecting the amount of certain fees connected with the new mode of conveyance, and powers as to the examination of a married woman respecting her consent to execute an indenture, are delegated to this Court, or rather the chief justice thereof, and the certificate of the examination and affidavit are to be lodged with an officer of this Court, and the Court of Common Pleas is empowered to make orders and regulations as to the mode of examination of married women respecting their consent, and the memorandums, certificates, affidavits and other proceedings. (y)

The Court of Common Pleas has also exclusive jurisdiction over all mixed actions, excepting actions of *ejectment*, which we have seen may be prosecuted in King's Bench, Common Pleas,

(q) *Ante*, Com. Dig. Court, B. 2, C. 1; 4 Inst. 199; 2 Sellon's Pr. 333; Roscoe on Real Actions; *Dally v. King*, 1 Hen. Bla. 1; Bac. Ab. tit. Court of King's Bench; and *Id.* tit. Court of Common Pleas.

(r) 2 Sellon, 620.

(s) *Ibid.* 620, 621.

(t) 4 Inst. 99; Com. Dig. Court, C. 1; 3 & 4 W. 4, c. 74, s. 9; Harrison's Index,

tit. Fines, vol. i. 639; and tit. Recoveries, vol. ii. 373.

(u) *Evans v. Jones*, 9 Bing. 311.

(x) See the heads of the act, *ante*, vol. i. 341, 341 a, b, c, d, 2d. edit. in note, and the whole act in the Supplement of A.D. 1834.

(y) 3 & 4 W. 4, c. 74, s. 84 to 92; and see Rules, Trin. A.D. 1834, of Common Pleas thereon, 1 Bing. New Cases, 242.

CHAP. V.
SECT. IV.

or Exchequer. *Quare Impedit* can only be sustained in this Court, excepting at the suit of the king, who may sustain that proceeding in any Court. (s) A writ of *dower* also, whether for the assignment of dower alone or for that and damages where the husband died seised, must be in this Court, or in the County Court by justices, or upon a special custom by plaint in the Court of the lord of the manor, but it is usually in this Court. (a) The ancient writ of waste to recover the property wasted, and now abolished, must also have been in this Court. (b)

The 11 G. 4, and 1 W. 4, c. 70, s. 14, and the 1 W. 4, c. 3, s. 4, enacted, that writs of right and other *real* actions then depending in the Courts of Session for Chester and Wales, should be heard and determined in the Common Pleas, and all subsequent real actions arising in those districts must be brought in this Court. But any continuing increase of business attributable to that change was soon destroyed by the 3 & 4 W. 4, c. 27, s. 36, repealing, after the 1st June, A.D. 1835, all the real and mixed actions and writs of partition therein enumerated, (excepting writs of right, of dower, *quare impedit* or ejectment, and plaints in Manor Courts for free bench;) and by another enactment putting an end to fines and recoveries hereafter to be passed or suffered in the Court of Common Pleas. (c) So that by the ancient contrivances and invasions of jurisdiction before alluded to on the one hand, and this repeal of its exclusive branch of jurisdiction over real and mixed actions on the other, this superior and excellently constituted Court has been greatly abridged of jurisdiction, and no sufficient arrangement for an increase of other business has been made, although considering the peculiar learning of the judges of this Court and of the serjeants, it would have been well to have restored much if not the whole of the ancient exclusive jurisdiction over all actions of ejectment, and all questions relative to real property and conveyancing, and incidentally relating to parochial settlements in respect of estate, which it will be seen frequently involve many difficult questions relative to those subjects. By such restoration would be encouraged and more highly cultivated depth of learning on those subjects, which, in the other Courts, at present are sometimes too hastily and insufficiently examined, and would certainly tend to cause an improved administration of justice on those very important subjects.

In order, in some measure, to compensate the subtraction

(s) *Ante*, Fitz. Nat. Brev. 32 e; 2 Sell. Pr. 321.

(a) 2 Sell. Pr. 294.

(b) 2 Sell. Pr. 338; *Harrow School v.*

Anderton, 2 Bos. & Pul. 86; *Green v. Cole*, 2 Saund. 252.

(c) 3 & 4 W. 4, c. 74.

of business which the Court of Common Pleas has of late, without reason, sustained, it is highly expedient that the Courts of Equity should send their *Cases* for opinion to the judges of this Court, and direct their *issues* on questions of fact to be tried in this Court in preference to that of the King's Bench, where the press of business, owing to its more multifarious jurisdiction, frequently causes an inconvenient accumulation and arrear of business. (*d*)

Although not strictly connected with the *jurisdiction* of this Court, yet as materially affecting the practice of those learned serjeants who had resolved to devote themselves principally to this Court, it may be proper here to notice that it was originally proposed to abolish the exclusive privilege of the serjeants by act of parliament; but afterwards it was ascertained that the same object might be effected by the king's warrant, and, accordingly, on the 25th April, 1834, a warrant, under the king's sign manual, was issued, and under which, after reciting that it had been represented to his majesty that it would *tend to the general despatch of the business* depending in the several Courts of law at Westminster, if the right of counsel to practise, plead and be heard, be extended equally to all the said Courts, the Court of Common Pleas, in and after Trinity Term, A.D. 1834, was opened to all barristers, whether serjeants or not; and all barristers have an equal right and privilege to practise in this Court; but by the same warrant it was declared, that several serjeants therein enumerated shall rank next after the junior king's counsel, but such privilege is not to extend to any serjeant that might thereafter be made. (*e*). The terms of the warrant are, "Whereas it hath been represented to us that it would tend to the general despatch of the business now pending in our several Courts of Common Law at Westminster, if the right of counsel to practise, plead and be heard, were extended equally to all the said Courts; but such object cannot be effected so long as the serjeants at law have the exclusive privilege of practising, pleading and audience during term time in our Court of Common Pleas at Westminster: we do, therefore, hereby order and direct that the right of *practising, pleading and audience* in our said Court of Common Pleas during term time, shall, upon and from the first day of Trinity Term now next ensuing, cease to be exercised exclusively by the serjeants at law; and that upon and from that day our counsel learned in the law and all other barristers at law, shall and may, according to their

Exclusive privilege of the serjeants abolished, and the Court opened in Banco to all barristers. (*e*)

(*d*) See *ante*, 350 to 353.

Observer, vol. vii. 527, and vol. viii. 15.

(*e*) See Warrant, 10 Bing, 371; Legal

CHAP. V.
SECT. IV.

respective rank and seniority, have and exercise equal right and privilege of *practising, pleading* and *audience* (*f*) in the said Court of Common Pleas at Westminster with the serjeants at law. And we do hereby will and require you to signify to Sir Nicholas Conyngham Tindal, Knt. our Chief Justice, and his companions, justices of our said Court of Common Pleas, this our royal will and pleasure, requiring them to make proper rules and orders of the said Court, and to do whatever may be necessary to carry this our purpose into effect."

Habeas corpus. (*g*)

In case of illegal imprisonment the Court of Common Pleas in term time, or one of its judges in vacation, has now equal and concurrent jurisdiction with the Court of King's Bench, to issue a writ of *habeas corpus* under 31 Car. 2, and 56 G. 3, c. 100, already noticed. (*h*) To this Court appertains, as it did also to the Court of Exchequer, the right at *common law*, where any officer of the Court, or any party to a suit in that Court, was imprisoned, to grant this writ; and if it appeared that the party was illegally detained, to discharge him; (*i*) but before the above acts, if it appeared that the party was confined for a *criminal* matter, neither this Court nor the Court of Exchequer could proceed to investigate the charge, but were bound to remand him; or else if the offence was bailable, to take bail for his due appearance in a Court of criminal jurisdiction. (*k*) Now by the former act, "it shall be lawful for any prisoner to move and obtain his habeas corpus, as well out of the High Court of Chancery or Court of Exchequer, as out of the Court of King's Bench or Common Pleas, or either of them; and if the Lord Chancellor, or Keeper, or any judge or judges, baron or barons, for the time being, of the degree of the coif, of either of the Courts aforesaid, in the vacation time, upon the view of the warrant of commitment or detainer, or upon the oath made that such copy was denied, shall deny any writ of habeas corpus, by the said act required to be granted as therein mentioned, they shall severally forfeit 500*l.* to the prisoner or party aggrieved;" (*l*) so that under these two acts the Court of Common Pleas and Exchequer, though properly neither has any *criminal* jurisdiction, is bound, if required, to

(*f*) These terms are so comprehensive that no doubt they extend to the *signature of pleadings* and every other description of business that serjeants could practise. It will be observed that this rule removes the inconvenience before noticed respecting motions for a new trial in the Court of Common Pleas, *ante*, 323.

(*g*) See in general *ante*, vol. i. 684 to 695; and this vol. *ante*; Bac. Ab. tit.

Court of Common Pleas; and tit. Habeas Corpus; Com. Dig. tit. Courts C.; 31 C. 2, c. 2, s. 10; 56 G. 3, c. 100; *Wood's case*, 3 Wils. 172.

(*h*) *Ante*, 327, 328.

(*i*) Bac. Ab. Habeas Corpus, B. 1.

(*k*) *Id. ib.*; but see 2 Sellon, 621; *Wood's case*, 3 Wils. 172; *Bushel's case*, Vaughan, 155; 2 Hale's P. C. 144.

(*l*) 2 Sellon's Pr. 621.

exercise the power of discharge or bailing in criminal cases. It is, however, as we have seen, much more usual to apply to the Court of King's Bench, or one of its judges, for discharge from imprisonment, or bailing upon any *criminal* or other charge unconnected with the process of the Court of Common Pleas; (*m*) and this, as we have seen, even when the party is in custody for some alleged offence against the revenue laws, properly cognizable in the Court of Exchequer. (*n*)

The statutes relative to arbitration and *awards*, giving summary jurisdiction to the Court of King's Bench, equally extend to this Court. (*o*) And the *annuity acts*, 17 G. 3, c. 26, and 53 G. 3, c. 141, s. 6, also extend to the Courts of Common Pleas and Exchequer, and authorize each, when an action on the annuity deed is brought thereon, or when the warrant of attorney authorizes a judgment to be entered up in this particular Court, to interfere on motion. (*p*) And whenever, as one of the securities, there is a warrant of attorney authorizing a judgment *only* in this Court, then a motion to set aside the security *must* be made in this Court, unless in cases within the 6th section, and when it is more probable that the Court of King's Bench will set aside the deeds, without imposing any terms on the debtor. (*q*)

The statute 7 G. 2, c. 20, as to summary applications for relief by *mortgagors*; (*r*) the 11 G. 2, c. 19, s. 17, as to summary appeal by *tenants* against the proceedings and record of justices of the peace, and to obtain restitution; (*s*) and the statute 4 Ann. c. 16, s. 20, and 11 G. 2, c. 19, s. 23, as to *Bail bonds* and *Replevin bonds*, (*t*) equally extend to the Court of Common Pleas, and enable that Court also to afford relief; and the observations upon the jurisdiction of the Court of King's Bench affecting those subjects will here in general equally apply to the jurisdiction and practice of this Court.

This Court also has original summary jurisdiction by rule of Court and *attachment* over its *own officers* and ministers, and all other persons guilty of contempt against the Court itself, or its rules or orders; (*x*) and by a rule of Hilary term, 14 J. 1, the Court may remove unfit or even *unskilful* attornies. We have seen that the lien of an attorney is less favoured in

Awards.

Annuities.

Mortgagors,
tenants, bail
bonds, replevin
bonds, &c.Attornies and
officers. (*u*)(*m*) Tidd, 28.(*n*) Ante, 327.(*o*) Ante, 328.(*p*) Ante, 329.(*q*) Ante, 338.(*r*) Ante, 331.(*s*) Ante, 361.(*t*) Ante, 333.(*u*) See fully, ante, 338.(*x*) See ante, 338; 4 Inst. 100; Com. Dig. Courts, C. 1; Tidd, 58; Kilbey v. Weyberg, 12 Mod. 251; Worley v. ———, id. 318; Anonymous, id. 440; Anonymous, id. 583; Craddock v. Glin, id. 657.

CHAP. V.
SECT. IV.

this Court than in the King's Bench, and that therefore this Court will permit cross actions or interlocutory orders for costs to be set off against each other, even in prejudice to the attorney's lien, (y) a distinction which may induce a plaintiff's attorney in some cases to prefer the Court of King's Bench to this Court. (y)

Prohibition.

With respect to any controuling jurisdiction over inferior Courts, it was determined by all the judges that this Court, as well as the King's Bench, has jurisdiction by *prohibition* to confine temporal as well as ecclesiastical Courts within their proper jurisdiction; (z) but it is more usual to apply to the Court of King's Bench for that writ in term, (a) or to the Chancellor in vacation, if an inferior Court should then press forward in a suit over which it has not proper jurisdiction. (b) And we have seen that it has been decided that this Court has no jurisdiction by prohibition to restrain a bishop from committing waste. (c)

Removal of proceedings from inferior Courts.

Before judgment the Court of Common Pleas always removed the *civil* proceedings of an inferior Court, even of record, by certiorari or habeas. (d) But a *writ of error* does not lie *after* judgment from an inferior Court of Record into this Court. The decisions and treatises are at variance upon this point; but this is certainly the result. (e) However, all proceedings in Courts *not of record* are removeable *before* judgment into the Common Pleas by pone or recordari facias loquelam or accedas ad curiam, or *after* judgment by writ of false judgment. (f)

No indictment or presentment, or conviction or order, or matter of a public nature, can be removed by certiorari or other

(y) *Ante*, 321.

(z) Vaughan's R. 157; *Robert's case*, 12 Coke, 68; 4 Inst. 92, 99; Bac. Ab. Court of Common Pleas; 2 Sellon, 428, 621; 1 Woodes. Vin. Lec. 116; Tidd, 38; and 1 W. 4, c. 21; Impey's Pr. C. P. 4, *ante*, 355.

(a) In *Ex parte Dr. Battine*, 4 B. & Adol. the Court of Common Pleas had been previously applied to without success.

(b) 7 Ves. 257; 2 Sch. & Lef. 136; Com. Dig. Chancery, Appendix, tit. Prohibition.

(c) *Ante*, 359, *post*, *Ecclesiastical Jurisdiction*.

(d) Tidd, 38; 1 Leb. Ab. 505; but see 2 Sellon, 621; 3 Bla. Com. 410, 411, note (p); Finch L. 480; *Ap Richards v. Jones*, Dyer, 250; *Roe v. Harth*, Cro. Eliz. 26.

(e) 2 Sellon, 621; Tidd, 1138; Finch L. 480; *Ap Richards v. Jones*, Dyer, 250 a; and *Roe v. Harth*, Cro. Eliz. 26, where the report is thus: "It was held by all the justices that a writ of error doth not lie in the Common Pleas upon an erroneous judgment given in any Court of record, and this, as they said, on great advice;" see also 3 Bla. Com. 410; Impey, Common Pleas, 752, *accord.*; but see Tidd, 38; Bac. Ab. Error, I. 5, *contra*. In compensation for the great invasions on the jurisdiction of this Court, it would be a salutary enactment that all writs of error, false judgment, and all proceedings for reinvestigating the decisions or acts of inferior Courts, were returnable and decided in this Court, and afterwards, if any further appeal were allowed, then into Exchequer Chamber.

(f) 2 Sellon, 621; Tidd, 38.

proceeding into this Court, nor has it any jurisdiction to issue a *mandamus*.

CHAP. V.
SECT. IV.

Nor has this Court any jurisdiction over or in relation to *crimes*, (g) or as it is technically said this Court has no crown side; (g) and they will not even give time *to put in bail* so as to await the decision of the judges, on an indictment against the defendant. (h) Though the Court of Common Pleas and Exchequer have enlarged the *time for rendering* the principal, when he is in custody upon a criminal charge, (i) and the King's Bench will discharge the bail when the principal is under sentence of transportation. (k)

Not over crimes.

SECT. V.—Of the Court of Exchequer of Pleas, &c.

SECT. V.

The Court of EXCHEQUER, as originally constituted, was a Court of Record merely for the hearing and determining of matters relating *to the revenue of the Crown*; (l) and in many respects revenue questions must exclusively be heard and determined either on the common law or equity side of this Court and not in Chancery; (m) and hence it is supposed by other Courts that this Court is *more eligible* for the decisions upon revenue questions, and may be so, subject to the possibility of bias in favour of the crown. (n) The Exchequer was originally divided into *eight* distinct Courts—as 1. *The Court of Pleas*, (still the proper *Law Court*); 2. The Court of Accounts; 3. The Court of Receipt, which was considered the true centre, into which all the king's revenue and profit ought to be paid; (o) 4. The Court of Exchequer Chamber, being the assembly of all the judges of the superior Courts for matters of law; 5. The Court of Exchequer Chamber, as erected by 31 E. 3, c. 12, for errors in judgment of the Court of Exchequer of Pleas itself; 6. The Court of Exchequer Chamber for errors in the King's Bench, and erected by 27 Eliz. c. 8, (now by 1 W. 4, c. 70, s. 8, the only Court of Error as well from King's Bench, Common Pleas and Exchequer of Pleas); 7. *The Court of*

The Exchequer and its several Revenue and Law Courts.

(g) Hawk. b. 2, ch. 1, s. 1; Bac. Ab. Courts, A., 5 Taunt. 503; Tidd, 478.

(h) *Joyce v. Pratt*, 6 Bing. 377.

(i) *Post*, 403; *Bennett v. Kinnear*, 3 Moore, 259; *Attorney-General v. Phillips*, 13 Price, 523; and see Price's Prac. 93, 105 to 118.

(k) Tidd, 289 to 297; Supplement, 82.

(l) 4 Inst. 103, 119; Mad. Exch. 109, 121; Vin. Ab. Courts of Exchequer, O.;

Com. Dig. Courts, D. where the jurisdiction of each of these Courts is separately stated.

(m) 3 Bla. Com. 428, 429; *post*.

(n) 7 T. R. 174; 1 Taunt. 120; Tidd's Suppl. 188; *ante*, 327, 328.

(o) 2 Inst. 197; see an excellent modern view of that Court, and an account of the office of the Lord Treasurer's Remembrancer of and in the Exchequer, 2 Mau. Exch. Pr. Appendix, 249, &c.

CHAP. V.
SECT. V.

Equity in the Exchequer Chamber, of which the Lord Treasurer and the Chancellor and Barons of the Exchequer were the judges, (p) and still continued and improved by the recent acts, 57 G. 3, c. 18, and 3 & 4 W. 4, c. 41, s. 25 & 27; 8. The Court of *First Fruits and Tenths*, erected tempore Hen. 8, but which was dissolved and the clergy discharged thereof by 2 & 3 P. & M. c. 4. By 1 Eliz. c. 4, the first fruits and tenths were reunited to the crown, and although this ancient Court itself was not revived, yet such first fruits and tenths were placed within the rule, survey and government of the Exchequer, (q) and the circumstance of such first fruits and tenths being cognizable especially in the Exchequer, gave rise also to *suits for tithes* being anciently there instituted; and as the Court had become particularly conversant with tithe law, it has ever since been the practice to prosecute tithe suits in the Exchequer in preference even to the Court of Chancery, (r) though in the latter Court the decree is more extensive than in the Exchequer, viz. by compelling the defendant to account for his tithe to the time of the decree or even to the time of the master's report, whilst in the Exchequer the decree only compels account to the time of filing the bill. (s) If the owner of the tithe proceed by bill in equity or in the Exchequer, he must waive all actions for penalties for not setting out tithe. (t) Suits in the Exchequer for tithe are now usually on the equity side of this Court; (u) they are preferable when the litigation is with several parishioners, and when, if the tithe owner were to proceed at law, numerous actions would be necessary; but when there has been *an agreement* between the tithe owner and a particular parishioner to pay a composition in lieu of tithe, and there is an arrear due under the agreement, or when predial tithe (not agistment) has not been set out, and the treble value of such tithe will be more than sufficient to defray all the costs at law, then an action of debt for treble or single value is in general preferable.

The Exchequer
of Pleas. (x)

The first specified Court, viz. *The Court of Pleas*, is the Exchequer Court of *Law*, and was properly and anciently the Court in which debts or duties to the king were to be recovered, usually by *information* by the attorney-general, and *actions* by and against the officers of this Court, and the king's actual

(p) 4 Inst. 118; Bac. Ab. Court of Exchequer.

(q) 4 Inst. 120; Plowd. 377, 542.

(r) 3 Atk. 247; and see 1 Mad. Ch. Pr. 104, 105.

(s) 2 Atk. 137; 1 Mad. Ch. Pr. 105.

(t) 1 Mad. Ch. Pr. 108; 1 Vern. 60; 1 Anstr. 100.

(u) 2 Man. Exch. Pr. 508, 509.

(x) See its jurisdiction in general, Com. Dig. Courts, D. 2.

debtors, and against actual prisoners in the Fleet Prison of the Court, were always sustainable in this Court. Magna Charta prohibited real, mixed and personal actions to be brought elsewhere than in the Common Pleas, and the statute of Rutland, 10 Ed. 1, in affirmance, as is said, of the common law, enacted that "*no plea shall be held in the Exchequer unless it specially concern the king or his ministers.*" (y) But under the fiction that a party was the king's minister or debtor, and that by the defendant's withholding the debt or having committed the injury, the plaintiff was *less able* to pay the king, jurisdiction was assumed and established over all private claims in personal actions between subject and subject, although in truth neither was an actual debtor to the king. (x) In some cases also a preference was by this means given to the Court of Exchequer, as in debt on simple contract; wager of law was not allowed in this Court, and the process of venire did not require personal service; and we have seen that the jurisdiction of this Court in personal actions is at least impliedly recognized by the act establishing a uniformity of process; (a) and it is not now even necessary, or indeed proper, in a declaration in the Exchequer, to allege that the plaintiff is a debtor to the king, any more than it is now necessary or proper in the King's Bench to state that the defendant is in the custody of the marshal, unless that be the fact. (b) It was, however, considered that a plaintiff cannot proceed in this Court by *original writ* from the Chancery returnable here. (c).

In this Court a plaintiff has four terms in which to enter a common appearance for the defendant, under 12 G. 1, c. 29, s. 1, an advantage in favour of a plaintiff's proceeding here. (d) It has been supposed by some that this Court *adopts* the practice of the King's Bench, and by others that of the Common Pleas, (e) but these suppositions are equally erroneous, for the barons are wholly independent excepting of their oath, and which binds them to decide and act according to their *own independent opinions*, though the previous decisions of their own or any other Court upon the terms of a statute or general rule, or upon a general matter of practice, which ought to be similar

(y) 4 Inst. 113, 114; Plow. 209; Stoke, 20.

(x) Bac. Ab. Court of Exchequer; 4 Inst. 112; 3 Bla. C. 44; 2 Sell. Pr. 1 ed. 599, 600.

(a) *Ante*, 2 W. 4, c. 39; 3 & 4 W. 4, c. 67, s. 1.

(b) *Hirst v. Pitt*, 3 Tyrw. R. 264; 1

Crompt. & Mee. 324.

(c) 1 Price R. 309; Tidd, 38.

(d) *Cook v. Allen*, 3 Tyrw. 378; contra to practice of King's Bench, where the appearance must be within two terms, 10 B. & C. 437.

(e) Price Pr. Advertisement, vii.

CHAP. V.
SECT. V.

When the jurisdiction of the Exchequer is *exclusive*.

in all the Courts, will doubtless be considered with the best attention before they will be departed from. (*f*)

We have seen that in some cases even of personal actions this Court has *exclusive* jurisdiction, as where the king's revenue is concerned, or an action has been brought in another Court against a revenue officer for something done or omitted by him connected with his office, and when we have seen the proceedings may be removed into this Court. (*g*) So by the Lottery Act, 36 G. 3, c. 104, s. 38, when in force, actions for penalties must have been commenced and prosecuted in the Exchequer. And, in general, *penalties* incurred under the Stamp Acts must be sued for by and in the name of the attorney-general or in the name of the solicitor or some other officer of the stamps, and usually in this Court. (*h*)

Not in real or mixed actions excepting ejectment.

But this Court has no jurisdiction over *real* or mixed actions, excepting in *ejectment*, which was acquired by fiction of the plaintiff being a debtor, though at what time does not appear. (*i*) In one case of ejectment this is the only proper Court in which to proceed, as if A. have the title to lands under an extent out of the Exchequer for debts in aid, he must bring his ejectment for them in this Court, and having brought his ejectment for them in the Court of Common Pleas, he was, on motion, ordered to prosecute here. (*k*) So if A. be outlawed at the suit of B., and lands in the possession of A. are extended, and C. claims title to them, and pleads to the inquisition, he must bring an ejectment for them in this Court and not elsewhere, because the king's revenue is deemed to be concerned. (*l*) And indeed in all suits in another Court, if it appear from the pleadings that the revenue is concerned in the event, the cause may be, as we have seen, removed into the Office of Pleas. (*m*)

Feigned issues.

Feigned issues, or other issues, are also properly framed and triable on the plea or law side of the Exchequer, but by plea only, and not even then merely on motion; (*n*) and an issue will not be directed to be tried in the Exchequer unless for some special reason and on motion for that purpose. (*o*) And regularly these are only the result of some summary application to the Court when the affidavits are contradictory, (*p*) or are

(*f*) And see *Doe d. Fry v. Fry*, 2 Crompt. & M., 254, as to the practice of the Court of Exchequer probably changing and becoming assimilated to that of the other Courts in like cases.

(*g*) *Ante*, 316, 317.

(*h*) 44 G. 3, c. 98; 5 G. 4, c. 41.

(*i*) 2 Man. Ex. Pr. 504.

(*k*) Hardr. 193, 176; and see 2 Vern.

146; Bac. Ab. Court of Exchequer.

(*l*) Hard. 176.

(*m*) *Lamb v. Gunman*, Parker's Rep. 143; *ante*, 316, 317.

(*n*) 2 Man. Ex. Pr. 505; 4 T. R. 402; 12 East, 247.

(*o*) *Antrobus v. E. I. Company*, 5 Mad. Rep. 3.

(*p*) 2 Man. Ex. Pr. 505; 6 Taunt. 75.

framed under the authority of an inclosure or other act, or they are sent from the equity side of the Court of Exchequer or from Chancery. (*q*)

CHAP. V.
SECT. V.

With respect to the *summary jurisdiction* of this Court, as in cases of awards, annuities, mortgages, bail bonds, replevin bonds, &c. over which we have seen the Courts of King's Bench and Common Pleas have jurisdiction on affidavits and motion, the statutes giving such jurisdiction in general equally apply to this Court. There are, however, singular exceptions as to *summary applications*, as well under the fifth section of the Annuity Act, 53 G. 3, c. 141, which only in terms authorizes a judge of King's Bench or Common Pleas to compel the production of the original deed; and it seems that an application by a tenant against the decision and record of justices of the peace, and to obtain restitution under the 11 G. 2, c. 19, s. 17, only extends to the Courts of King's Bench and Common Pleas, and not to this Court. These two exceptions historically shew that the legislature did not, at the time those acts were passed, treat the Court of Exchequer as a Court of law for the decision of private rights between subject and subject, though undoubtedly by the fiction of *quo minus* this Court had long before contrived to exercise jurisdiction in those cases.

Summary jurisdiction.

The *Habeas Corpus* Acts, 31 C. 2, c. 2, and 56 G. 3, c. 100, expressly extend to the Court of Exchequer and the barons thereof; but when the party is in custody under a *criminal* charge, it is, we have seen, more usual to apply for the writ and discuss the legality of the imprisonment in the Court of King's Bench; (*r*) and when a party is in custody under any irregular process upon a *revenue* charge, it is always better for him to apply to the Court of King's Bench than to the Court of Exchequer, for reasons before assigned. (*s*)

Habeas corpus.

The Court has jurisdiction over warrants of attorney, authorizing a judgment in this Court; and though it has been decided that by the practice of this Court, contrary to that of King's Bench and Common Pleas, the Court of Pleas will not interfere to set aside a warrant of attorney on the ground of illegality, but the defendant must apply for relief to the equity side of this Court, (*t*) the present practice is otherwise. But

Warrants of attorney.

(*q*) 2 Man. Ex. Pr. 505, and cases in note (*r*).

(*r*) *Ante*, 327.

(*s*) *Ante*, 327, 328.

(*t*) *Matthews v. Lewis*, 1 Anstr. 7; 2 Man. Ex. Pr. 500, note (*i*), but who judiciously adds *tamen quære*.

Matthews v. Lewis, 1 Anstr. 7. Partidge and King moved for a rule to shew cause why the judgment entered up by the plaintiffs should not be set aside, on the ground of usury, which was disclosed by affidavits.

By the Court.—To set aside judgments

CHAP. V.
SECT. V.

Jurisdiction
over its officers
and attorneys
practising
there.

Practice in out-
lawry.

a judgment cannot be entered up in the Exchequer on a warrant of attorney to confess judgment in a Court of Great Sessions, because the statute 1 W. 4, c. 70, speaks only of the removal of *suits*, and a warrant of attorney, although authorizing a suit, cannot in itself be deemed a suit. (*u*)

This Court has a jurisdiction over its own officers and attorneys, similar to the Courts of King's Bench and Common Pleas; (*x*) and it seems also to have had summary jurisdiction over an attorney of another Court, who practised in the Exchequer in the name of a side clerk before the late act. (*y*)

We have sufficiently noticed the privilege of officers of the Court of Exchequer, and of all revenue officers, to have actions against them removed into and proceeded on in this Court. (*z*)

Although an original writ out of Chancery could not nor can be returnable in this Court so as to proceed to outlawry at the suit of a subject for debt; (*a*) the uniformity of process act, 2 W. 4, c. 39, s. 56 and 57, now expressly authorizes proceedings to outlaw upon a *capias* or *distringas* issued under that act; and the seventh section enables the chief baron to appoint an officer to execute the duties of a filazer, exigenter, and clerk of the outlawries in this Court. (*b*) And though an affidavit as to the attempt to serve a defendant with process may not be sufficient to warrant a *distringas* to take his goods, or to entitle the plaintiff to enter an appearance for the defendant, yet it may suffice to authorize the Court to issue a *distringas* for the purpose of proceeding to outlawry. (*c*) And upon a judgment of outlawry in the King's

of this kind is to usurp the office of a Court of Equity by the summary jurisdiction of a Court of Law. It may be necessary at least to direct an issue to try the validity of the transaction, which a Court of Law cannot compel, and the introduction of this second innovation in the practice, rendered necessary by the first, shews how dangerous it is to confound the jurisdictions of the different Courts. The regular process of a Court of Equity seems in every respect the best adapted to this case, for the plaintiff is entitled in conscience to the money he has really advanced, and if we set aside the judgment, he loses that with the rest; a Court of Equity, on the other hand, decrees what is really due, and no more; (but see now otherwise, 17 Ves. J., 44, and *ante*, 337 (*z*)). The Court of King's Bench has granted such motions, perhaps, that is now become so much the practice of the Court as not to be disputed *there*; but in this Court no such precedent has been established, and we do not see any rea-

son to make one. Besides, this is nothing like usury. It is a catching bargain, an extortioning post orbit, but no usury.

The rule was refused.

(*u*) *Williams v. Williams*, 1 Tyr. R. 351.

(*x*) *Ante*, 337.

(*y*) *Evans v. Duncan*, 1 Tyr. 283; 1 Crompt. & J. 372.

(*z*) *Ante*, 316, 317; and see *R. v. Piskman*, 3 Anst. 852; *Bedingfield v. Shelford*, 8 Price, 584.

(*a*) *Horton v. Peake*, 1 Price R. 309; 1 Tidd, 38, 132, Supplement, 100; Dax, Pr. Ex. 84; Price Pr. Exc. 52; see 2 Dowl. Stat. 2 W. 4, c. 39, and *notes*.

(*b*) And see 2 & 3 W. 4, c. 110, s. 149; Tidd's Supp. A. D. 1834, p. 100.

(*c*) Per *Ld. Lyndhurst*, C. B., and *Bayley*, B., in *Hewitt v. Mellor*, 3 Tyrw. 822; 1 Crompt. & Meeson, 720; the form of the note at the foot of the writ is different in such case, see No. 3, sched. 2 W. 4, c. 39, and *post*.

Bench, a motion may be made and rule obtained in this Court for a sequestari facias to sequester the profits of two benefices, the writ of capias utlagatum, with the returns, being filed in the Exchequer, and the profits of the benefices vested in the crown; and writs in the nature of sequestari facias to the bishop being required, whereupon the bishop will provide for performance of the duty. (d) In case of an outlawry in any Court, it is the course of the Exchequer to prefer an information in nature of trover and conversion against any person who has the goods of the outlaw; (e) and though the proceedings in the Courts of King's Bench and Common Pleas are not in general subject to revision in the Exchequer of Pleas, yet it appears that erroneous outlawries in those Courts may, on account of the king's interest therein, be vacated in this Court. (f) And therefore where an outlaw had died abroad before a treasury warrant and the attorney-general's consent had been granted in order to authorize the sheriff to pay over money in his hands under a capias utlagatum to the plaintiff in the action, it was held that that warrant and consent granted in ignorance of the previous death, did not vest the money in the plaintiff, and the Court on motion of the defendant's executors, stayed payment over to the plaintiff by the sheriff till their plea of defendant's death should be traversed and the facts tried. (g)

It is also laid down, that although it is more usual to proceed in the Court of King's Bench upon informations in the nature of quo warranto, to try the right of particular persons to hold offices in corporations, or to exercise other franchises, yet that a writ of quo warranto also lies in the Exchequer; (h) and an information in the nature of a quo warranto may be exhibited in the Exchequer in the name of the attorney-general, although that Court is not mentioned in 9 Anne, c. 20. (i) The proper course in the Exchequer, it is said, is to issue a writ to the sheriff, directing him *generally* to inquire into usurpation of franchises; upon which he is to take an inquisition finding the particular usurpation intended to be drawn in question; and then the defendant is to traverse or demur to the inquisition and proceed as in the King's Bench. (k)

(d) *In re Outlawry, Hinde, Clerk*, 1 Tyr. R. 347.

(e) Per Hale, C. J., in Mod. 90; Bac. Ab. tit. Court of Exchequer, C.

(f) *Browne v. Welshe*, M. 5 & 6 Ph. & M. Rot. 37; Jones, J. E. R. Mem. Outlawry, and 2 Man. Ex. Pr. 624.

(g) *R. v. Bachanan*, 3 Tyrw. R. 229.

(h) Com. Dig. Quo Warranto, A., *Sir Edmond Bacon's case*, Hardres, 129; 2 Man. Ex. Pr. 509; see *ante*, 367.

(i) Co. Ent. 535 b; 2 Man. Ex. Pr. 510.

(k) Co. Ent. 530 b; 2 Man. Ex. Pr. 510; Sel. N. P. tit. Quo Warranto.

CHAP. V.
SECT. V.

Prohibition.

As far as regards the jurisdiction over inferior Courts, it seems that a *prohibition* may be issued out of this Court to restrain an inferior Court from proceeding in a suit, or in a manner in which it has not jurisdiction; (*l*) and supposing a Court should proceed in a suit against a revenue officer, contrary to the summary order before alluded to, (*m*) probably the obtaining this writ would be one mode of preventing the other Court from proceeding, though the Court of Exchequer might proceed more summarily against the plaintiff in the action by attachment, for the contempt in disobeying the order of the barons.

Removal of civil
suits from in-
ferior Courts.

The books of practice state that this Court has jurisdiction to remove by *certiorari* civil suits commenced in inferior Courts of record into this Court, whether on the behalf of a plaintiff or of a defendant: (*n*) and we have seen that unquestionably a jurisdiction exists in favour of the crown, when its interests are involved, or an action brought against one of its officers for any thing done or omitted in that character, of prohibiting the plaintiff from proceeding otherwise than in this Court. (*o*)

Proceedings on
recognizances or
for fines, &c.

Recognizances, in whatever competent Court or jurisdiction they have been acknowledged, are always considered as *records*; and in respect of the actual or supposed due investigation and sanction given to them by the Court, judge, or other public officer before whom they are acknowledged, have more validity than in ordinary contracts not of record; and it has therefore been held, that a person of the age of sixteen is competent to enter into a recognizance conditioned to prosecute a criminal charge; and that if it be forfeited and estreated into this Court, it cannot be discharged unless a sufficient special ground for relief be made out; (*p*) but although the Court may, consistently with their general practice, be obliged to refuse to *discharge* a recognizance, yet they have power to *mitigate* the penalty. (*q*) Formerly, whenever a recognizance, of whatever description or wherever acknowledged, became forfeited, it was always estreated into and proceeded upon in the *Court of Exchequer*, as the proper revenue Court of the king, (*r*) and all applications for relief against the forfeiture after the estreat

(*l*) See the cases 2 Man. Ex. Pr. 505 to 507.

(*m*) *Ante*, 316, 317, 394.

(*n*) Skin. 244, 246; Tidd, 397, referring to Man. Ex. Pr. 152.

(*o*) *Ante*, 316, 317; Hard. 176; Parker, 143; 1 Anst. 205; 1 Price, 206; Man. Ex. Pr. 161. 164; Tidd, 397; Chitty's

Com. Law, vol. i. 805, 806.

(*p*) *Ex parte Williams*, M'Clel. Ex. R. 495.

(*q*) *In the matter of Hooper*, *id.* 578.

(*r*) Or rather into the office of the Lord Treasurer's Remembrancer of and in the Exchequer, see 2 Man. Ex. Pr. Append. 251, and note.

had taken place, were necessarily to this Court. (s) Afterwards, the 3 G. 4, c. 46, s. 6, and 4 G. 4, c. 37, transferred much of this jurisdiction to the respective Courts of Quarter Sessions, and which have power even to discharge the whole of the forfeited recognizance. (t) After this enactment, it was at first supposed that it did not determine or affect the jurisdiction of this Court, and that if a recognizance had in fact been estreated into this Court, it might here be discharged, mitigated, or compounded for as theretofore, according to the equity and circumstances of each case. (u) But it has been since doubted whether the Courts of Quarter Sessions can now in any case, since September, 1822, cause a forfeited recognizance, taken before them or justices of the peace, to be estreated into the Court of Exchequer; and it should seem that if improvidently the recognizance should be so estreated, the Court will not interfere. (x) Certainly since that act the Court of Exchequer has no jurisdiction over estreats of *recognizances not returned into it*, and the Courts of Quarter Sessions alone has jurisdiction to relieve against the forfeiture of recognizance within its jurisdiction. (y) But as regards *penalties, forfeitures, and fines*, as on jurors for non-attendance, or occurring during the *assizes*, application for relief may still be made to this Court. (z)

When a motion was to be made to discharge a forfeited recognizance estreated into this Court on an affidavit suggesting grounds for relief, the proper course was for the counsel to be furnished with a *constat* of the proceedings from the office of

(s) From the returns from the Court of Exchequer, extracted from the Report of the Select Committee on Finance, in 1798, it appears that the business of the office of the Lord Treasurer's Remembrancer of and in the Exchequer, was formerly very considerable, being the office principally concerned in what respected the *lunded* and *casual* revenue of the crown. And in to that office, all escheats of fines, issues, recognizances, amerciements, and other forfeitures, were, at the time of such return, viz. in 1798, regularly *transmitted* from both Houses of Parliament, from the Court of King's Bench and Common Pleas, and the Office of Pleas in the Exchequer, from the Justices of Assize, Justices of the Peace, Commissioners of Sewers, and from all other jurisdictions wherein they were set and imposed; and after these had been thus transmitted, the parties concerned have an opportunity of formally *traversing* the king's right. And at the commencement of each reign a writ of privy seal is issued *ex gratia*, allowing

the parties to apply in a summary way to the Court of Exchequer, to compound or discharge any fines, issues, amerciements and recognizances, according to the circumstances of each case, and which is the source of the jurisdiction of this Court to hear motions on these subjects. 2 Mann. Ex. Pr. Append. 251 to 254.

(t) Per Lyndhurst, C. B., in *R. v. Thompson*, 3 Tyrw. R. 54; *R. v. Hawkins*, 1 M'Clel. & Y. 27.

(u) See 3 G. 4, c. 46, and 4 G. 4, c. 3; *Pellow's case*, 12 Price, 299, cited 1 M'Clel. & Y. 29, and other cases cited 1 Tyrw. R. Index, xlv. But see 1 M'Clel. & Y. 31, note (a).

(x) *R. v. Hawkins*, 1 M'Clel. & Y. 27.

(y) Per Lyndhurst, C. B., in *R. v. Thompson*, 3 Tyrw. R. 54; *R. v. Hawkins*, 1 M'Clel. & Y. 27.

(z) *Ex parte Sir T. Clarges*, 1 Young & J. 399; *Ex parte Ford* and *Ex parte Brown*, *id.* 401; *R. v. Hawkins*, 1 M'Clel. & Y. 27.

CHAP. V.
SRCT. V.

the clerk of the estreats, in order that the Court might see what the recognizance was; and the motion should be made on one of those days in the week when the treasurer's remembrancer (now the king's remembrancer) is present in Court, and notice of motion should be given to him and to the solicitor of the treasurer; and if those proceedings have not been observed, the motion will be refused. (a) By 3 & 4 W. 4, c. 99, s. 41, the offices of the lord treasurer's remembrancer, as well as of the clerk of the estreats, were abolished; and by s. 45, the records of those offices were transferred to that of the king's remembrancer, and who, by s. 46, is to perform all the duties of the abrogated offices, subject to the *orders* of the barons. By s. 47, copies and extracts of all the records so transferred are declared to be as available in evidence as before the offices were abolished. (b) But s. 37 expressly retains the jurisdiction of the barons as to the said *finés, issues, amerciements, penalties, forfeited recognizances* and *estreats*, or any *process* or *proceeding thereon*. (b) Where the amount of estreats to be certified by clerks of the peace, town clerks, &c. to this Court, is under 5*l.*, they may verify the return by affidavit, without commissions or personal appearance; (c) and in *scire facias* against the conusor of a recognizance to the crown, no costs are recoverable by the defendant, although he succeed on demurrer and in error. (d)

Newspaper recognizance.

The 1 W. 4, c. 73, requires every publisher of newspapers and pamphlets to execute a recognizance or bond with sureties, for securing the payment of fines upon conviction for libels and damages and costs, in actions for libels; and the third section gives the Court of Exchequer in particular, upon affidavit, summary power to direct proceedings upon such recognizance or bond. But in order to obtain the interference of this Court against a surety, it must be shown by positive affidavit that the plaintiff has used due diligence to obtain satisfaction from the goods of the principal obligor. (e)

Extents in chief or aid.

This Court, in connection with this revenue jurisdiction, has very extensive jurisdiction over writs of extent and in aid, and generally every description of proceeding connected with the revenue or debts to the king or his debtor; (f) thus it lies against the insolvent agent of a life insurance company, where

(a) *R. v. Holden and another*, 3 Tyrw. R. 580, and *Ex parte Dunk*, 2 Id. 500.

(b) *Ex parte Tomlins*, 2 Tyrw. 176,

(c) *Ibid.*; 3 G. 4, c. 46, s. 14.

(d) *R. v. Bingham*, 1 Tyrw. R. 262.

(e) *Pennell v. Thompson*, 1 Crompt. & Mees. 857; 3 Tyrw. R. 823.

(f) See the practice fully Tidd, 9 ed. 1043 to 1083; 11 G. 4, and 1 W. 4, c. 73; *R. v. Bingham*, 1 Crompt. & M. 862; see the older practice as to extents, West on Extents, and 2 Manning's Ex. Pr. 513 to 620; 1 Tyrw. R. Index tit. Extents.

it is found by inquisition that he had received a sum due to the crown for insurance duties, although the company also were liable to the crown. (g) But a crown debtor who has issued prerogative process against his own debtor, is not entitled to continue those proceedings after he has paid the debt due to the crown. (h) For a false return to an extent, by which return the crown, or the prosecutor, is prejudiced, an information may be filed in this Court, in the name of the attorney-general, whether the return be complained of as false in fact or insufficient in law; as where the sheriff to an extent had returned that the goods at the time he *received* the extent were in his hands under writs of fieri facias, *and that the said goods and chattels were then subject to such prior execution*, which was the part of the return objected to as insufficient in point of law. (i)

This Court has peculiar jurisdiction in enforcing the payment of *legacy duty*. The 42 G. 3, c. 99, s. 2, authorizes a rule of this Court, on the part of the Crown, calling on executors or administrators to shew cause why they should not deliver an account on oath of legacies and personal property paid or to be paid or administered by them, and why the legacy duties thereon should not be paid; and upon such rule nisi being served upon the executor and parties interested, they are to shew cause, and counsel for the crown argue in support of the rule; and if the Court shall be of opinion that the duty is payable, the order is made absolute, and if not obeyed an attachment issues. (l) But the rule for an attachment against an executor

Crown's recovery of legacy duties. (k)

(g) *R. v. Wrangham*, 1 Tyrw. R. 383.

(h) *R.* (in aid of) *Hollis v. Bingham*, 1 Crompt. & M. 862.

(i) *R. v. Giles, Sheriff of Herts*, MS., and 2 Mann. Ex. Pr. 632, 633; and so held in *Giles v. Grover*, 9 Bing. 128; 2 Moore & S. 197, S. C.

(k) See also 55 G. 3, c. 184, ante, vol. i. 547; and see *In matter of Vivian*, 1 Crompt. & J. 409, and *Re Pigott*, 1 Crompt.

& M. 827; and see the course of proceedings in *Re Cholmondely*, 1 Crom. & M. 149. In *Re Bruce*, 2 Tyrw. Rep. 475.

(l) 42 G. 3, c. 99, s. 2; *Re Bruce*, 2 Tyrw. Rep. 475; *Re Cholmondeley*, 3 Tyrw. Rep. 10, and other cases Chitty's Col. Stat. 1018, 1019, and *id.* Stamp Act, 3 Chitty's Rep. 456; 2 Young & Jerv. 290; 2 Mer. 45.

42 G. 3, c. 99, s. 2, enacts that in every case in which any executor or executors or administrator or administrators shall not have paid the duties granted and payable upon or in respect of any legacies, or any personal estate, or any share or shares of any personal estate of any persons dying intestate, by and in pursuance of an act passed in the thirty-sixth year of the reign of his present Majesty, or any other act or acts of Parliament relating to duties on legacies or shares of personal estates within proper and reasonable time, it shall be lawful for his Majesty's Court of Exchequer, upon application to be made for that purpose, on behalf of the commissioners appointed for managing the duties on stamped vellum, parchment or paper, on such affidavit or affidavits as to the said Court may appear to be sufficient, to grant a rule requiring such executor or executors, administrator or administrators to shew cause why he, she, or they should not deliver to the said commissioners an account upon oath of all the legacies or of the personal property respectively paid or to be paid or administered by him, or her, or them, as the case may be, and why the duties on any such legacies, or any shares or residue of any such personal estate have not been paid or should not be

Where executors, &c. shall not have paid the duties on legacies, under 36 G. 3, c. 52, (s. 6, &c.) the Court of Exchequer, on application from the Stamp Office, may grant a rule against such executors to deliver in an

CHAP. V.
SECT. V.

for not delivering an account at the legacy duty office is *nisi* only, (*m*) and the statute is not imperative in the Court, but gives them a discretionary jurisdiction; (*n*) and where a rule had been obtained against a surviving executor, it appearing that he had never acted except in signing some documents and had never received any assets, the rule against him was discharged. (*n*)

Taxes.

It has been held that the Court of Exchequer will not enter into any question of rateability to the assessed taxes. (*o*) But several subsequent decisions establish that questions upon assessments and rateability repeatedly are decided in this Court, as that if a person occupy part of a year he is liable to pay an entire year's taxes, (*p*) and when a shop, having no internal communication with the house, is rateable separately. (*q*)

A summary application may be sustained in this Court against the Commissioners of Land Tax to compel a *due* assessment of that tax, (*r*) and where the commissioners exceed the power given them by 43 G. 3, c. 161, s. 15, by discharging an assessment without a notice of appeal before them, the Court of Exchequer will order them to amend their schedule so as to cancel their discharge; (*s*) and relative to re-assessment of parishes and which are under the care and control of the Exchequer; (*t*) and the Commissioners of Taxes were ordered by the Court of Exchequer to state and sign a case for the appellants, for the opinion of a judge, where a question arose respecting certain increase of duty made by a surveyor on the appellants, (*u*) though probably a motion to the King's Bench for a mandamus would be a preferable proceeding. (*x*) Probably in all cases of taxes or matter of revenue, a parishioner or the sureties

account on oath of legacies paid, &c.

forthwith paid according to law, and to make any such rule of Court absolute in every case in which the same may appear to the said Court to be proper and necessary for the better enforcing the payment of any of the said duties.

(*m*) *Re Vyvyan*, 1 Tyrw. R. 379, and 1 Crompt. & J. 409, S. C.

(*n*) *Re Pigott*, deceased, 1 Crompt. & M. 827.

(*o*) *R. v. Navy Commissioners*, 3 Anstr. 858. For there is another remedy by appeal to the commissioners under 43 G. 3, c. 99, s. 24.

(*p*) *Price's Case*, 8 Price R. 122; *In re Colyton*, *id.* 117; *Sollett and Glass' Case*, *id.* 123; *Skinner's Case*, *id.* 124; *Wright's Case*, *id.* 125.

(*q*) *In re Reinhardt*, 8 Price, 106; *R. v. Dryden*, *id.* 103; *In re Cowell*, *id.* 105.

(*r*) *Attorney-General v. Commissioners of Land Tax*, 12 Price, 647; 1 Tyr. Rep. Index, Revenue.

(*s*) *In re Colyton*, 8 Price, 117.

(*t*) 1 Tyr. Rep. Index, tit. Revenue; 7 Price, 594; 12 Price, 153; 5 Burn's Justice, tit. Taxes, 714.

(*u*) *In re Yarmouth Commissioners*, 9 Price R. 149; and see 43 G. 3, c. 99, s. 29, requiring such case if applied for. In case the opinion of a learned judge should be against the assessment, and the party assessed has paid it, the Tax Office may order the Receiver-General to repay such money. See 45 G. 3, c. 71, s. 3. By 4 G. 4, c. 11, copies of cases determined by the judges are to be annually laid before Parliament.

(*x*) *Ante*, vol. i. 792 to 794.

of a collector might, by resorting to this Court, or perhaps to the Court of King's Bench, compel the collector more exactly to collect and make payment of the sums given him in charge to collect, or otherwise interpose when from the too frequent neglect to call upon him for a strict and exact discharge of his duty the parish or the sureties would be placed in peril. The protection of *parishes* from liability to re-assessment is a peculiar object of the care of the Court of Exchequer. (y) Parishioners and sureties for collectors would do well, to prevent the frequent losses occurring, to see that the conditions of the bonds executed be so qualified as to be imperative on the obligee to compel the collector very frequently to account and pay, or that the bond shall not be binding on the sureties, and also constantly to take care that such condition be complied with, and if not, to cause warrants to issue, and if refused, to apply to the Court of Exchequer or a baron for his fiat for an extent in aid, though the issuing of such warrant is not essential antecedent to such extent. (z) If, on the other hand, the acting Commissioners of Taxes should refuse, unless indemnified, to proceed to make a re-assessment on a parish to which the deficiency of a collector applies, this Court will order them to do so by rule to shew cause in the nature of a mandamus, and also order that a service on their clerk shall be deemed good service; nor is the crown limited to any time within which to make such an application. (a) It is in this Court that a party is to obtain his discharge from a crown debt, (such as an arrear of taxes,) and obtain his release from process when the debt has been paid by the crown debtor, upon motion by the attorney-general. (b)

In the acts relative to the *customs*, under the head of *management*, and the power to compel private individuals or corporate bodies to let buildings, the former act, 6 G. 4, c. 106, s. 43 & 45, entitles the Lord High Treasurer or the Commissioners of his Majesty's Treasury, or any person interested in but dissatisfied with the verdict of the jury impannelled, to try the amount of rent, &c. by appeal to the Court of Exchequer.

Unless where a particular statute gives jurisdiction to commissioners or justices of the peace, as in many cases under the laws of customs and excise, (d) this Court has *exclusive juris-*

Customs.

Exclusive by
information on
seizures. (c)

(y) *R. v. Bell*, 11 Price, 772, and other cases; 5 Burn's Justice, tit. Taxes, 26th edit. 713, 714, note (a).

(z) *R. v. Coltenridge*, 3 Price, 280; 5 Burn's Justice, tit. Taxes, 26th edit. 714, in note.

(a) *In re Wootton*, 6 Price, 103.

(b) See the proceedings *Ex-parte Bennett*, 11 Price, 770.

(c) See in general 1 Tyr. Rep. Index, liii.

(d) 2 Burn's Justice, tit. Excise and Customs.

CHAP. V.
SECT. V.

diction; thus there cannot be an information upon a seizure to condemn goods by proclamation but in this Court of Exchequer, and the reason assigned is, because upon all such seizures every person concerned may have and know a certain place to resort unto for his remedy in this kind. (e) The Court will not compel the attorney-general to state particulars of the charges meant to be relied upon in an information by him or other officer of the crown, or any measure of a similar nature, although the charges cover a space of thirty years, &c. (f)

In case of a seizure of goods under the laws of custom or excise, *fourteen* days are allowed for entering claims, but even after that time, upon an affidavit of merits, the Court will set aside the condemnation and admit the investigation of the claim, (g) but then it seems that the costs of the condemnation and of the application must be paid. (h)

By 6 G. 4, c. 108, s. 73, all penalties and forfeitures incurred or imposed by any act relating to revenue of customs may be recovered by action of debt or information in *any Court of Record* at Westminster, in the name of the attorney-general, or of an officer of customs, or before two justices; by 7 & 8 G. 4, c. 53, s. 37, all excise penalties, &c. in *Exchequer*; and by 56 G. 8, c. 104, s. 15, in name of attorney-general or by order of commissioner.

Petitions of right, &c. between king and subject.

The Court of Exchequer appears to be the proper tribunal for the trial of petitions of right, or bill of manifestation of right, or a traverse of office. (i) Where a judgment for the crown has been reversed, the effect of the judgment in favour of the plaintiff in error is, that he be restored to all the property claimed, and so of rents received by the sheriff and not paid over. (k) But money that has once reached the king's hands can it seems be recovered only by petition, (l) and it is said that a crown lease once extended cannot be restored, because by the judgment and extent the lease has become vested in the crown as the lessor, and thereby merged and extinct. (m)

Crown practice in the Exchequer.

A defendant who has been arrested on a revenue information filed against him, and has entered into a recognizance

(e) Per Parker, Ch. B., Parker's Rep. 69; and see Com. Dig. Courts, D. 2.

(f) *Attorney-General v. Lambeth*, 5 Price, 386.

(g) *In re Ship Louisa Margareta*, 1 Price, 48.

(h) *Attorney-General v. Cullen*, 8 Price, 668.

(i) 2 Man. Exch. Pr. 578 to 584; 4 Coke, 57, 58; Godbolt, 300, pl. 417.

(k) 2 Man. Exch. Pr. 624.

(l) Per Westbury in *Sir John Rigley's Case*, Tr. 7 H. 6, fo. 44, pl. 22.

(m) Moore, 237; but see *Lillingstone's Case*, 7 Coke, 37.

of bail to appear and answer, cannot move to discharge such recognizance on the ground of the attorney-general not having proceeded to trial according to notice, till after three clear terms exclusively have elapsed, nor after issue joined, but after the time for which notice of trial had been given; thus a defendant arrested in Michaelmas term having given bail in Hilary term and received notice of trial for the subsequent sittings, cannot move until after Michaelmas term. (n) A defendant may plead in person to an information by the crown in the Exchequer. (o)

This Court has no immediate jurisdiction in relation to crimes, nor has this Court any crown side like the King's Bench. (p) But where a defendant in one action is under imprisonment upon a sentence for a libel or other criminal matter or process of a criminal court, the bail may in this Court obtain time for rendering him till a week after the imprisonment under the sentence shall have expired. (q) So a prisoner in the criminal custody of the marshal of King's Bench may be brought up by habeas corpus under 2 W. 4, c. 39, s. 8, in order to charge and detain him with a declaration in this Court. (r) And where a party is in custody of the sheriff of a distant county under an attachment issuing out of the Exchequer, and a bill of indictment has been found against him in Middlesex, for perjury committed in that county, the proper course seems to be for the prosecutor to move this Court for an habeas corpus directed to the sheriff of the distant county, and requiring him to have the prisoner at the next General Sessions of Oyer and Terminer of Middlesex, giving notice of the motion to the prisoner and to the gaoler of such distant county. (s)

No jurisdiction over criminal matters, excepting collaterally.

The equity jurisdiction of the Court of Exchequer will presently be considered amongst the Courts of Equitable Jurisdiction.

Of Courts of Equity in general. (t)

We have attempted to explain the distinctions between *legal* and *equitable* rights, injuries and remedies; (u) and shewn that the Legislature and the Courts consider it of essential importance to keep those distinctions inviolate, not only as they

Of Courts of Equity.

(n) *Attorney-General v. Bear*, 6 Price, 89.

(o) *Attorney-General v. Carpenter*, 1 Tyr. 351.

(p) 5 Taunt. 503; Tidd, 478.

(q) *Campbell v. Ackland*, 3 Tyrw. R. 230.

(r) *Ess v. Smith*, 3 Tyrw. 363.

(s) *In re Wellon*, 1 Tywr. R. 385.

(t) As to the jurisdiction of chancery in general, see Chit. Eq. Dig. tit. Jurisdiction, 584 to 603.

(u) *Ante*, vol. i. 6, 7, 8, 333, 354, 354, 365 to 373.

CHAP. V.
SECT. V.

affect *claims*, but also as regards *defences*, for reasons that have been explained. (v) The principal distinction between Courts of Law and Courts of Equity as respects *jurisdiction* is, that the former have exclusive cognizance over *legal* rights and *legal* defences, whilst Courts of Equity have peculiar cognizance of *equitable* rights and defences. But there are many other grounds for resorting to a Court of Equity, as for a *discovery* of facts. Another principal distinction between Courts of Law and Equity is, that the former, in personal and mixed actions, usually award *damages* as a compensation for the injury; whereas a Court of Equity (except in a few instances) never decrees *damages* (x) or *compensation* singly, without other relief, and the granting compensation to purchasers is only a peculiar exception, incidental and ancillary to that jurisdiction which the Court possesses in giving relief by enforcing a specific performance of contracts in matters of *freehold*; (y) and although on a bill filed, a Court of Equity will set aside a fraudulent release, yet that Court will not decree *payment* of the debt released, but leave the claimant to recover the same at law after getting rid of the effect of the release. (z) However, on a bill for the arrears of an annuity charged on land, a Court of Equity has jurisdiction to decree that the amount shall be *raised* by the sale or mortgage of the estate; (a) and it is said that the Court of Chancery has jurisdiction over a demand for a sum certain in favour of the *officers* of that Court; (b) and a bill may be filed against an executor to discover assets, and for equal distribution amongst creditors or legatees. Equity may also give relief by decreeing payment of the debts out of those assets. (c) So where a negotiable instrument, as a bill or note, has been lost, after tendering an indemnity, a bill may be filed praying a decree of *payment*. (d) Another distinction is, that Courts of Equity are not rigidly bound by rules not prescribed by statute, as Common Law Courts are. (e)

We have alluded to the several invasions by Courts of Law and Equity reciprocally upon each other's jurisdiction, and seen that in some respects (as in the instance of a *lost* deed and

(v) *Ante*, vol. i. 7; and see observations of Lord Kenyon in *Goodtitle v. Jones*, 7 T. R. 50; *Bauerman v. Radenius*, 7 T. R. 667; and *Mathews v. Lewis*, 1 Anstr. R. 7.

(x) *Bovey v. Tracy*, 2 Eq. Abr. 163; *Clinan v. Cooke*, 1 Scho. & Lef. 25.

(y) *Newham v. May*, 13 Price, 749; 1 M'Clel. 511, 515, S. C.; Chit. Eq. Dig. tit. Compensation, 221; and *Id.* tit. Jurisdiction of Chancery, 585; and see in-

stances of compensation to purchasers, *ante*, vol. i. 842 to 844, 865 to 868.

(z) *Pascoe v. Pascoe*, 2 Cox, 109.

(a) *Cupit v. Jackson*, 13 Price, 721; 1 M'Clel. 495, S. C.

(b) *Barker v. Dacre*, 6 Ves. 681.

(c) *Heath v. Percival*, 1 Stra. 408.

(d) *Glyn v. Bank of England*, 2 Ves. sen. 327; *Mossop v. Eadon*, 16 Ves. 430.

(e) *Martin v. Marshall*, Hobart's R. 63.

matters of account) Courts of Law and Equity have *concurrent jurisdiction in some few respects* as regards the *right* and the *defence*, though the form of the *remedy* materially varies. We will now examine, with more particularity, the jurisdiction of Courts of Equity, which are divided into those of the Chancellor and his Court of Chancery, exercised by himself or the Vice-Chancellor; and the Court of the Master of the Rolls, and the Equity Side of the Court of Exchequer; and, *first*, of the jurisdiction of the Chancellor and the Court of Chancery.

SECT. VI.—Of the Jurisdiction of the Chancellor and Court of Chancery.

First. The Common Law Jurisdiction of the Chancellor.

Secondly. The Equitable Jurisdiction of the Court of Chancery is principally in Cases of—

1. Accidents and Mistakes.
2. Accounts.
3. Frauds, various, and Means of preventing Frauds or relieving against the same.
4. Infants.
5. Specific Performance.
6. Trustees, Executors and Legacies.

Thirdly. The Statutory Jurisdiction of the Chancellor.

Fourthly. The specially delegated Jurisdiction, as over Idiots and Lunatics.

The Principal Peculiarities in the Jurisdiction of Chancery.

Course of Proceedings in Chancery is Formal or Summary.

Annuity Deeds.

Arbitrations and Awards.

Against Solicitors.

When the Court of Chancery has no Jurisdiction.

No Criminal Jurisdiction.

Not over Marriage or Alimony and Exceptions.

When over Wills.

Not if Remedy or Defence at Law.

Unless Jurisdiction concurrent.

Not when Matter *infra dignitatem*.

A Summary of the Jurisdiction of Courts of Equity.

The Chancellor how relieved from Pressure of Business.

The jurisdiction of the Chancellor and Court of Chancery, whether vested in him individually *virtute officii*, or as the judge presiding in the *Court* of Chancery, are very extensive. In matters relating to *private rights* (the principal objects of our present inquiry) the jurisdiction has been usually arranged under *four* principal heads, viz. *First*, the Chancellor's *common law* jurisdiction; *Secondly*, his *equitable* jurisdiction, or rather the jurisdiction of the Court itself over which he presides; *Thirdly*, his statutory jurisdiction; and *Fourthly*, his specially delegated jurisdiction; (*f*) and it may be convenient to follow that order as corresponding with the Treatises and Digests, though the subjects are certainly capable of a better and more

SECT. VI.

I. The Court of CHANCERY and the CHANCELLOR'S JURISDICTION, either original or by statute. (*f*)

(*f*) As to the jurisdiction of Chancery in general see Chit. Eq. Dig. 584; Com. Dig. Chancery, 603; Mad. Ch. Pr. 1; Chit. Eq. Dig. tit. Jurisdiction of Chancery, 3 Bla. C. 47, 426, note 1; S. Smith's Chancery Prac. 3. The 53 G. 3, c. 24,

s. 2, appears to recognize these several objects of jurisdiction. The Court of Chancery, so far as concerns its *common law* jurisdiction, is a Court of record, though not so as to its *equitable* jurisdiction, 2 Mad. Ch. Pr. 712.

CHAP. V.
SECT. VI.First, Common
Law jurisdiction
of Chancellor.

systematic arrangement, which we will, for the use of students, presently suggest.

First, With respect to the *Common Law* Jurisdiction of the Chancellor, it principally relates to litigation between private parties by *action* in the *Petty Bag Office*; a Court, or rather office, in which all personal actions by or against any officer or minister of the Court of Chancery may and ought in strictness to be brought in respect of his service or attendance in that Court. (g) In this Court also the Chancellor has jurisdiction to hold plea of *scire facias* to repeal the king's letters *patent*, (h) traverses of offices, *scire facias* on recognizances, (i) executions upon statutes, &c. If a *demurrer* be joined upon the pleadings in this Court, the Chancellor may give judgment, (j) but if an issue of *fact* be joined, the record must be delivered to the Court of King's Bench and *there* tried, and a motion for a new trial should be there made and judgment given. (k) And after verdict in an action in the Petty Bag Office, an application to discharge the defendant for not having been charged in execution within two terms, must be made to the King's Bench, though the Court of Chancery, to remove any difficulty, will make a collateral order to the same effect imperative on the plaintiff. (l) It is said that the Court of Chancery will not allow writs of error in the King's Bench upon judgments in the Petty Bag. (m)

The issuing of writs of *Supplicavit*, particularly on behalf of married women and against peers, to obtain sureties to keep the peace, is a useful branch of the common law jurisdiction of the Chancellor. (n) A writ of Habeas Corpus, returnable before the Chancellor, especially in vacation, when the judges may be on the circuit, is an important jurisdiction, fully established after great consideration; (o) and thereby at all times relief can be *instantly* obtained from unjust imprisonment. (o) Writs of *Certiorari* and *Prohibition* may also be issued by the Chancellor, returnable before himself or the Vice-Chancellor, but the latter will be issued only in vacation. (p)

The Chancellor has jurisdiction at all times to issue a writ of

(g) 1 Mad. Ch. Pr. 4.

(h) *Prince's case*, 8 Coke, 4; 4 Inst. 79.

(i) *Grant v. Stone*, 1 Vern. 213; 1 Mad. 4.

(j) *King v. Knaz*, Coop. 98.

(k) 1 Mad. 4.

(l) *Fraser v. Lloyd*, 19 Ves. 317; Coop. 187, S. C.

(m) *Rex v. Cory*, 1 Vern. 131.

(n) *Ante*, vol. i. 683; 3 Ves. & B. 183; 1 Jac. & W. 348; 1 Mad. 11.

(o) *Ex parte Crowley*, 1 Swanst. 1; Buck, 264, S. C.; 1 Mad. Ch. Pr. 21;

ante, vol. i. 694.

(p) *Donegal v. Donegal*, 3 Phil. B. 597.

The Court of Chancery will not entertain a motion for a *prohibition* in *term time*, *Montgomery v. Blair*, 2 Schol. & Lef. 136. But as that Court is open in vacation, then when an inferior Court is pressing on improperly in a suit over which it has not jurisdiction, the application for the *prohibition* should be made in Chancery, 7 Ves. 257; Com. Dig. Chancery, Appendix, Prohibition.

prohibition to all inferior Courts, whether temporal or ecclesiastical, as to the Consistory Court of London, in case it should improperly assume jurisdiction; (q) and he may delegate to the Vice-Chancellor the hearing and deciding upon the propriety of issuing a writ of prohibition. (q) Yet in practice the Court of Chancery will not interfere in term time but only in vacation, because in term time application may be more properly made to the superior Courts of law for such prohibition. (r) It will be observed that a *prohibition* is directed to the *Court* wrongfully assuming jurisdiction, but an injunction only operates *in personam* and forbids the party to proceed in the inferior Court, at the risk of an attachment, should he be guilty of a contempt by proceeding. The Chancellor also, *virtuti officii*, has jurisdiction to issue various original writs and writs of error to other Courts, authorizing or commanding them to act, as amongst others the writ *de ventre inspiciendo* on behalf of an heir, &c. (s)

It has been said that this common law jurisdiction of the Chancellor is nearly obsolete, (t) but in many cases, especially in vacation, it may be exercised with great utility. And all the four branches of jurisdiction are expressly recognized and may be delegated, when the Chancellor thinks fit, to the Vice-Chancellor by the 53 G. 3, c. 24, s. 2, which speaks of the common law jurisdiction of the Chancellor, and also of that delegated to him by statutes as well as his equity jurisdiction. The Chancellor, *virtuti officii*, has power to remove *coroners* when guilty of misbehaviour. (u) But although he has jurisdiction over justices of the peace in their *appointment*, (x) afterwards, if a justice be guilty of misconduct, the only proceeding is by criminal information in the King's Bench, and after conviction he may be removed from the commission. (x)

Secondly, and principally, is the *Equity Jurisdiction* of the Chancellor and Court of Chancery, and which, although not a Court of record as regards its *equitable* jurisdiction, is the most extensive and useful in the realm. (y) The jurisdiction of

Secondly. The Equitable Jurisdiction in Chancery.

(q) *Donegal v. Donegal*, 3 Phil. 597.

(r) Com. Dig. Appendix to Chancery, tit. *Prohibition*, ante, 355, 388, 396.

(s) 1 Mad. Ch. Pr. 5 to 23.

(t) 1 Woodes. V. L. 125; 1 Mad. 5.

(u) *Ex parte Winwill Fresholders*, 3 Atk. 184; Chit. Eq. Dig. Coroners. See further Burn, J. tit. Coroner, iv. A coroner removed may have a commission to inquire whether the cause for removal be true, but he cannot traverse it, 1 Jac. & W. 454.

(x) *Ex parte Roch*, 2 Atk. 2; 2 Mad.

Ch. Pr. 720, 721; *Rex v. Constable*, 7 Dowl. & R. 663. The appointment is by letters patent under 27 H. 8, c. 24, s. 2; and see *Jones v. Williams*, 3 B. & C. 762. As to determining his authority, Burn's Justice, tit. Justice, li.

(y) Com. Dig. Chancery, C. 2. It seems that the Court of Chancery, so far as concerns its *common law* jurisdiction, is a Court of record, and therefore it has been suggested that a submission to arbitration may be made a rule of this Court under 9 & 10 W. 3, c. 15. 2 Mad. Ch. Pr. 712.

CHAP. V.
SECTION VI.

this Court is entirely *civil*, and, excepting in a few instances presently noticed, neither the Chancellor nor the Court of Chancery exercises any *criminal* jurisdiction even for the *prevention* of crime.

As regards *private rights* and remedies, the subjects of equitable jurisdiction and relief have been arranged by Mr. Maddocks, in his excellent treatise on the Principles and Practice of the Court of Chancery, and by others, under six principal heads, as 1. Accident and Mistake; 2. Account; 3. Fraud; 4. Infants; 5. Specific Performance of Agreements; 6. Trusts; (s) and though it is obvious that system has not been much regarded in that arrangement, yet as it has become familiar, we will adopt it, and afterwards add a few suggestions for a preferable arrangement.

1. Accidents
and Mistakes.
(a)

In cases of *accident*, this Court always afforded relief, as in cases of *lost deeds*; and anciently it was supposed, that if a bond were lost, so that no profit could be made on the declaration, (b) there was no remedy but to tender an indemnity, and file a bill in equity to compel payment; (c) but in progress of time, although (as the expression has been) the Chancellors *much grumbled* at the assumption, Courts of Law dispensed with the profit of any *deed*, and thereby obtained a *concurrent* jurisdiction; (d) and which also extends to the loss of a commission of bankruptcy, or any other document *not negotiable*, and in which cases, after proof of the loss, parol evidence of the contents is admissible in a Court of Law. (e) But although a Court of Law may have concurrent jurisdiction, yet if the terms of the lost deed be not certain, and the obligor knows them, then a bill partly for a discovery, and partly for relief, may be preferable, always first tendering an indemnity. However, in the case of a *negotiable instrument*, as a bill of exchange or promissory note, which possibly may have been received *bonâ fide* by a new party after the loss, so as to expose the acceptor or indorser to the possibility of another claim, or at least of litigation, a Court of Equity still

(s) 1 Madd. Chan. Pr. 23 to 26; vol. ii. 164.

(a) See cases collected 1 Chit. Eq. Dig. 197, 311; 1 Madd. Chan. Pr. 24.

(b) 1 Chan. Cases, 77.

(c) *Snellgrove v. Bailey*, 3 Atk. 214; *Walmsley v. Child*, 1 Ves. 341; *Toulmin v. Price*, 5 Ves. 235; *Ex parte Greenaway*, 6 Ves. 812; *Bromley v. Holland*, 7 Ves. 19; 3 Ves. & B. 54.

(d) *Read v. Brookman*, 3 T. R. 151;

2 Madd. Chan. Pr. 170; Com. Dig. Chancery, C. 2, and Z.; *id.* vol. 8, Appendix, Chancery, xvii. xviii. Equity will relieve even against a surety, and although the principal be out of the kingdom, 3 Atk. 93; 1 Chan. Cas. 77; 9 Ves. 464; but no relief will be afforded in equity if the bond were voluntary and without consideration, 1 Chan. Cas. 77.

(e) *Polly v. Millard*, Exchequer, 9 Law Journal, 114.

retains the sole and exclusive jurisdiction, on indemnity tendered and bill filed, to compel payment: (f) one principal reason is, that a Court of Equity, by referring the sufficiency of the security to one of its masters, can better provide for future risks than a Court of Law. (g)

So although we have seen that in some cases *mistakes*, or at least *ambiguities*, may be explained and remedied at law, yet in general it is advisable for the party desirous to rectify it to file a bill in equity. (i) Thus we have seen, that if a promissory note, in which a surety has joined, has by mistake been drawn only as a joint note, although it was intended to be joint *and several*, on a bill filed, a decree that a proper note shall be delivered may be obtained even against a surety. (k) And if an obligor be sued at law upon a bond framed as a money bond absolutely for the payment of money, and insists that it was intended merely as an indemnity bond, and that the obligee has not been damnified, he cannot plead such matter as a defence at law, but must file a bill: (l) and in general, in case of a mistake in a deed, recourse to a suit in equity is advisable, (m) where not only mistakes in the deed itself may be rectified, but the execution of a proper deed compelled, (n) and even the consequences of an omission to enrol a bargain and sale within six months may be avoided, by compelling a vendor to execute another similar deed, in order that the latter

(f) *Ante*, 408, n. (e); *Hansard v. Robinson*, 7 B. & C. 90; *Ryan & M.* 90; *Davies v. Dodd*, 4 Taunt. 602; see prayer of bill in *Glyn v. Bank of England*, 2 Ves. sen. 327; *Mossop v. Eadon*, 16 Ves. 430.

(g) But yet it will be observed, that the Court of King's Bench frequently refers the sufficiency of security, as security for costs, to the master of that Court and the Courts of C. P. and Exc. the same, and therefore that reason seems to fail. Where a bond, deed, bill of exchange, or note has been lost or destroyed, then, after a verbal request to pay and offer of indemnity, and refusal of payment, a *draft* of a joint and several bond, with two or more well-known responsible persons as sureties, and conditioned for fully indemnifying the debtor, in the event of any third person's claim, against the payment of the principal sum, as well as the interest, costs and expenses, should be prepared, tendered, and left with the debtor, with a request that he will cause the same to be returned for engrossment, approved or altered before a named day, and accompanied with an offer to pay any reasonable expenses he may thereby incur; and a notice that a bill in equity

will be filed in case he should refuse to pay on such indemnity; and in case he neglects to return the draft or refuses to accept the indemnity or pay, there is no necessity for tendering a bond engrossed on stamp. The same observation applies to the tender of a mortgage or other security. In case of continued refusal to pay, then a full affidavit of the contents of the lost instrument, and the circumstances of the loss, should be made, and the bill prepared and filed. 2 Ves. 89; *Renison v. Ashley*, 2 Ves. jun. 461; *Walmsley v. Child*, 1 Ves. 341; 1 Vern. 59, 180, 247, 310; 1 Chan. Cas. 11, 231; Mitf. Pl. 3d ed. 43, 100; 1 Madd. Chan. Pr. 26. But if equitable relief only is sought, then an affidavit seems unnecessary, Mitf. Pl. 100.

(h) See in general 1 Madd. Chan. Pr. 24, 47 to 85; Chit. Eq. Dig. tit. Mistake, 682.

(i) *Ante*, vol. i. 123, 394, 711, 833 to 844; and Chit. Eq. Dig. tit. Mistake.

(k) *Rawstone v. Parr*, 3 Rus. R. 424, 529; *ante*, vol. i. 710, 711.

(l) Cowp. R.

(m) See instances 3 Bla. Com. by Chit. 426 b, in notes.

(n) *Ante*, vol. i. 710, 711.

CHAP. V.
SECT. VI.

may be enrolled in due time after its execution.(o) In these cases the *draft* of an *amended* deed should be left with the party a reasonable time, and the like conduct observed as in the case of a lost instrument before any bill be filed.

2. *Accounts.*(p) 2dly. Matters of *accounts* of various descriptions, as between mortgagor and mortgagee,(q) principal and agent,(r) partner and partner,(s) and matters relating to *tithes* and various other matters of *account*, over which, as they are frequently complex and not readily ascertainable before a jury, and are better investigated in a master's office, this Court always exercised at least concurrent jurisdiction, provided the *account remains open*; that is, where there has not been a balance agreed.(t) Indeed in one case a learned judge supposed that he might refuse to try a case of complex account in an action

(o) 6 Ves. 745.

(p) See in general 1 Madd. Chan. Pr. 85 to 109; Chit. Eq. Dig. tit. Account, 2 to 22.

(q) Now, as we have seen, provided for to a limited extent even at law, *ante*, vol. i. 868.

(r) *Ante*, vol. i. 868.

(s) *Id.*; 1 Madd. Chan. Pr. 87 to 93; and see Chit. jun. on Contracts, 2d ed. 191 to 193, where a partner may sue at law, or must proceed in equity.

(t) *Ante*, vol. i. 868, 869; Com. Dig. Chancery, C. 2, A. 2. The equitable jurisdiction over matters of account arose from the writ of account at law not affording so complete a remedy, *Carlisle v. Wilson*, 13 Ves. 276. Mutual demands and the existence of several items to be examined into, are in general essential to sustain a bill for an account; and the cases of *Stewards* and of *Dower* are exceptions standing upon their own peculiarities, *Dinwiddie v. Bailey*, 6 Ves. 88 to 90, 141; and it is only complicated accounts, which, though cognizable at law, are likewise cognizable in equity, 1 Scho. & Lef. 309. A bill for an account must therefore allege that there still are numerous items subsisting, and not that they have been; for otherwise there is no reason why the complainant should not proceed at law, *Frietas v. Don Santos*, 1 Young & J. 674. In general, if a written account has been stated (though not signed) and agreed, or even retained a considerable time by the party to whom it was sent without his objecting, (from which such agreement may be inferred, but see *Clancarty v. Latouche*, 1 Ball & B. 428; and Chit. Eq. Dig. tit. Acquiescence,) the remedy is only at law, and a bill for an account

and to compel payment, cannot in such a case, unless fraud can be shewn, be sustained; because the requiring an account, which has already been agreed, is useless, and whenever the debt is fixed as by agreement, the proper remedy is at law as much as where there is a bond or covenant to pay a sum certain, 1 Madd. Chan. Pr. 100 to 103; *Hirst v. Parie*, 4 Price, 389; Com. Dig. Appen. Chancery, tit. Account. Before filing a bill, it will obviously be proper and essential, as respects the costs, to make a civil application for the account, and to wait a reasonable time afterwards. See the reason, *ante*, vol. i. 438, 439, 498, 509, 532; *Weymouth v. Boyer*, 1 Ves. jun. 428. If the account is simple, and the evidence readily examinable in the course of a few hours, then the preferable course is to proceed by action, as against a factor, or any other agent, with the security of bail; but when the items are numerous, and could not well be investigated in a day, it is advisable at once to refer to arbitration or file a bill in equity; and in the latter case a *ne ereat* may be obtained if the agent be about to proceed abroad, *ante*, vol. i. 732; when not, *Dick v. Swinton*, 1 Ves. & B. 371. The plaintiff usually pays costs, where an account turns out against him, or where he prevails in nothing but what he might have insisted upon at law; but though costs usually follow the event of the account, still if it was intricate or doubtful, no costs will be given; and where money was found due to the defendant upon the account, but much less than had been claimed by the defendant's answer, he was not allowed his costs. 2 Madd. Chan. Pr. 557; *Collyer v. Dudley*, 1 Tur. & R. 421; *ante*, vol. i. 868, 9.

at law, though that notion was erroneous,^(u) yet in matters of account between partners, it is clear that the only remedy is in equity for a balance, unless it has been agreed to as well as struck,^(v) or there has been a covenant to account or pay.^(x)

3dly. *Frauds* of every description, whether in the creation 3. *Frauds.*(y) of *contracts* or obtaining *deeds* or other instruments, or in any other transaction, and whether committed by trustees or attorneys, or other agents or party, and whether affecting heirs or wards or other parties, are the most fertile sources of litigation in the Court of Chancery, and a bill may be filed praying that the deed or other instrument may be delivered up to be cancelled or for other relief;^(z) and amongst these may be included all *catching bargains*, against some of which, however, when the contract is not under seal, a jury, by giving only nominal damages for the breach of the unfair bargain, can in effect afford relief at law.^(a) So where a deed has been *unfairly* obtained from an imbecile old man, a Court of Equity may decree it to be cancelled, although the circumstances do not establish a case strictly of fraud.^(b) But fraud in obtaining a *will* of *real* property is cognizable only at law, and must always be sent out of a Court of Equity to be tried at law by a jury.^(c)

As observed by Mr. Justice Ashhurst, *fraud* in obtaining a contract even under seal, when established in evidence, vitiates it as much at law as in equity, and may be pleaded in bar to an action on such deed.^(d) But by filing a bill in equity charging the fraud, and praying that the instrument may be delivered up, the obligor not only compels the obligee to state the truth at the risk of an indictment for perjury, but also, if he succeed in establishing the fraud, may have the securities delivered up and cancelled, so that he will be no longer in

(u) *Scott v. Mackintosh*, 2 Campb. 238; *King v. Rossett*, 2 Young & J. 83; *ante*, vol. i. 22.

(v) 2 T. R. 478; 2 B. & P. 134; 4 Moore, 340; Chit. jun. on Contracts, 191 to 193.

(x) *Ibid.*; 7 Mod. 116; 15 East, 8, 538.

(y) See in general 1 Madd. Chan. Pr. 109 to 331; Chit. Eq. Dig. tit. Fraud, 455 to 474.

(z) *Ibid.*; Com. Dig. Chancery, 3, M.; *id.* vol. 8, Appnd. Chancery, xvi.; 3 Bla. Com. by Chit. 426 d, in notes; *ante*, vol. i. 766, 779, 786, 833. As to the frequent injunction bills to prevent the negotiation of bills of exchange and pro-

missory notes, see *ante*, vol. i. 706; and to deliver up deeds, *id.* 709.

(a) *Ante*, vol. i. 112 n. (h); 458, n. (m); 826, 838; 3 Ves. & B. 117.

(b) *Blackford v. Christian*, Knapp's R. 73; *Diarmed v. Diarmed*, 3 Wil. & Shaw, 37, S. P.

(c) 3 Bla. Com. 431.

(d) *Cockshott v. Bennett*, 2 T. R. 768; 3 T. R. 48. That it *must* be pleaded, see *Edwards v. Brown*, 1 Tyr. R. 196. But it may be pleaded generally, without shewing the circumstances of fraud, because they are as much in the knowledge of the obligee as the obligor, 2 M. & B. 378; 9 Coke, 110.

CHAP. V.
SECT. VI.

peril of being sued at any distance of time, when the witnesses to prove the fraud may be dead, and if the deed constituted a charge upon his property, the incumbrance or impediment will by the decree be completely removed.^(e) But where both parties have acted fraudulently, as where deeds have been executed in order to create a colourable qualification under the game laws, or a vote at an election, or to induce a parent to consent to a marriage, a Court of Equity will not interfere.^(f)

Under this head of *fraud* and *prevention of frauds*, have been usually included, though obviously without regard to arrangement, several heads somewhat foreign or remote from the direct subject of fraud, as 1. Purchases by trustees and attornies or solicitors or others, in fiduciary situations, of the trust property; 2. Transactions between attorney and client; 3. Sales or agreements by expectant heirs, and gifts by a ward to his guardian; 5. *Injunctions* (a most comprehensive title); 6. Bills of peace; 7. Bills of interpleader; 8. Bills of certiorari; 9. Bills to perpetuate testimony; 10. Bills of discovery, (and here might also be included bills to produce deeds);^(g) 11. Bills quia timet; 12. Bills for delivery up of deeds, or for securing them, or the delivery up of specific chattels; ^(h) 13. Bills for apportionment, or to enforce contribution; 14. Bills in cases of dower and partition; 15. Bills to establish a modus; and 16. Bills to marshal securities.⁽ⁱ⁾

As regards many of these, especially *injunctions*, we have already fully considered them amongst the remedies to prevent *injuries*,^(k) and stated the principle on which injunction bills are sustained, as well as the practice in obtaining them,^(k) as they protect the person, or personal or real property. Thus as respects principally *personal* property, *injunctions* against partners to prevent ruinous conduct affecting the joint trade,^(l) or against agents or attornies to prevent disclosure of confidential communications,^(m) to prevent the negociation of bills of exchange, notes, &c.⁽ⁿ⁾ to compel the delivering up and cancelling of deeds, and other instruments,^(o) to prevent the breach of contract by some wrongful act,^(p) to prevent other

(e) *Ante*, vol. i. 709, 710; Newland on Contracts. And see distinction between legal and equitable jurisdiction in cases of fraud, *Fullager v. Clark*, 18 Ves. 438.

(f) 2 Jac. & W. 391.

(g) Smith's Chan. Pr. 362, 363, 513, 516.

(h) *Ante*, vol. i. 812 to 815; and *id.* 112.

(i) 1 Madd. Chan. Pr. 110 to 331; and see some of those heads Chit. Eq. Dig. tit. Fraud.

(k) *Ante*, vol. i. 695 to 736.

(l) *Ante*, vol. i. 704.

(m) *Ibid.* 705.

(n) *Ibid.* 706.

(o) *Ibid.* 709.

(p) *Ibid.* 711.

breach of confidence in divulging secrets in trade ; (q) to prevent injurious payments, sales or conveyances, (r) or other loss ; (s) to prevent preference, misapplication, or devastavit by an executor or administrator ; (t) to prevent the sailing of ships by the minority of ship-owners ; (u) to prevent the infringement of copyrights, patent rights, or inventions, (x) or other imitations. (y) So as respects *real property* we have considered bills to preserve boundaries ; (z) bills to prevent destructive wasteful trespasses, (a) or disturbances of franchises ; (b) to prevent the ill performance of lawful works ; (c) bills of peace to quiet possession and prevent successive vexatious litigation ; (d) to prevent waste, (e) or private (f) or public (g) nuisances.

With respect to bills of interpleader, we will presently notice them particularly. (h) Bills to perpetuate testimony have already been considered, (i) as well as writs of *ne exeat*, (k) and some other modes of preventing loss or injury. (l)

A bill in equity also lies to set aside letters patent obtained by *fraud* or *misrepresentation* ; (m) though scire facias returnable and tried in the Court of King's Bench is the more common proceeding : and the right to the patent may be tried by infringing it and then defending an action for the piracy. And such is the extensive jurisdiction of Chancery to relieve against fraud, that although in general a fine or recovery formally levied or suffered is conclusive, yet if a fine be obtained by fraud, equity will avoid its effect by decreeing the parties to reconvey, and thereby vacate such fine. (n) And a Court of Equity may relieve against a deed or instrument where it has been *unfairly obtained*, although there may not have been such a degree of *fraud* as to invalidate the instrument at *law*, (o) and not only the party immediately affected by fraud, but also

(q) *Ante*, 714.
 (r) *Ibid.* 715.
 (s) *Ibid.*
 (t) *Ibid.* 545, 551, 716 ; *Sharples v. Sharples*, M'Clel. R. 506.
 (u) *Ante*, vol. i. 717.
 (x) *Ibid.* 718.
 (y) *Ibid.* 721 ; *Marzetti v. Williams*, 1 B. & Adol. 425.
 (z) *Ante*, vol. i. 722.
 (a) *Ibid.* 722.
 (b) *Ibid.* 724.
 (c) *Ibid.* 725.
 (d) *Ibid.* 726.
 (e) *Ibid.* 726 ; against a Bishop, quære, when not, 1 Bos. & Pul. 105 ; but see 3 Swanst. 493, 499.
 (f) *Ibid.* 728.

(g) *Ibid.* 729.
 (h) *Post*, 417, 418.
 (i) *Ante*, vol. i. 733 ; *Smith's Ch. Pr.* 363, 367.
 (k) *Ibid.* 731.
 (l) *Ibid.* 734.
 (m) *Att.-Gen. v. Vernon*, 277, 370 ; 2 Chan. R. 353, S. C., and *Chitty's Eq. Dig.* tit. Letters Patent.
 (n) *St. John v. Gurner*, 1 Equ. Ab. 258 ; and see relief at law in *Conry v. Caulfield*, 2 Ball & B. 272.
 (o) *Fullagar v. Clark*, 18 Ves. 483 ; and see instances, *Blachford v. Christian*, Knapp's R. 73 ; *Diarmed v. Diarmed*, 3 Wils. & Shaw, 37, and 4 Wils. & Shaw, 346.

CHAP. V.
SECT. VI.Injunctions
to prevent or
restrain actions
or proceedings
at law. (u)

a creditor or third person, as a landlord, may file a bill to discover and have relief against the fraud affecting his interest. (t)

A bill for an injunction to restrain or controul proceedings at law or in other Courts, is one of the most useful parts of the jurisdiction of a Court of *Equity*, and is very extensive in its operation. When the defence is not at law, but only in equity, then a bill for an injunction is absolutely necessary; (u) and the bill must be filed as early as possible after the proceeding at law has commenced: for if there be any delay, we have seen that it may be too late to obtain relief. (x) And indeed when it is expected that the unjust proceeding at law will be founded on any deed or instrument obtained by undue means, a bill may and ought to be filed in anticipation, praying that it may be delivered up to be cancelled; (y) because if a bill be not filed until after commencement of proceedings at law, then the party praying relief may have to bring the money into Court. (z) A bill of this nature is also essential when a legal right of action has been improperly exercised, as if repeated actions for breaches of covenant or non-payment of rent have vexatiously been instituted by a landlord against his tenant. (a) It seems that an injunction may be obtained in Chancery to prevent proceedings in Scotland: for although the Court may have no jurisdiction over foreign Courts, yet the injunction will operate in personam. (b) If an attorney or solicitor proceed in an action at law for the amount of his bill of costs, pending or immediately after taxation of his bill, and before the costs of the taxation have been ascertained, he may be restrained by bill and injunction. (c)

An injunction of this nature (i. e. to stay proceedings at law) is in some respects preferable in its operation when obtained on the equity side of the *Court of Exchequer* than when obtained in Chancery; because, when obtained in the former Court, at whatever stage of the action before trial, it stays the trial and all pro-

(t) *Bennett v. Musgrove*, 2 Ves. 51, as to the remedy at law in case of a fraudulent warrant of attorney, *Martin v. Martin*, 3 B. & Adol. 934; ante, 336.

(u) See in general Chit. Eq. Dig. Practice, xlv. 12, 1045 to 1053; and see *ibid.* 1037; Eden. on Inj. 1 to 143, and 332. It is doubtful whether the circumstance of a plaintiff having committed a felony will induce a Court of Equity summarily or otherwise to prevent him from suing; though it seems that a Court of Law may so interfere. *Muro v. Kay*, 4 Taunt. 34; see *Willingham v. Joyce*, 3 Ves. J. 168; 1 Mad. Ch. Pr. 421. As to staying an action by an attorney, see

1 Clark & Fin. 125.

(x) *Ante*, 303, cites *R. v. Peto*, 1 Y. & Jerv. 169.

(y) *Ante*, vol. i. 706, 707, 709, 710.

(z) *Ante*, vol. i. 709.

(a) *Waters v. Taylor*, 2 Vesey & B. 302. The case of rent is the only one in which a Court of Equity will interfere by injunction to restrain proceedings at law upon a breach of covenant. *White v. Warner*, 2 Meriv. 459.

(b) 5 Madd. R. 297; 2 Swanst. 313.

(c) *Barr v. Wiggins*, 1 Clark & Fin. 125; *Wallon v. Johnson*, 2 Sim. 450; 2 B. & Ald. 745.

ceedings, as well as executions. Whereas in Chancery, unless the injunction be obtained *before declaration*, it does not stay trial but merely execution; (d) unless a special injunction can be obtained, (e) as sometimes is the case, upon a positive affidavit that the party cannot safely try without the plaintiff's answer being first filed. (e) Sometimes, however, the Court of Exchequer will, on motion, permit notice of trial to be given on an undertaking not to sue out execution. (f)

When a plaintiff at law expects that the defendant is about to file a bill in Chancery, and try to obtain an injunction so as to stay trial, then to prevent the defendant at law from obtaining the common injunction for want of an answer to the bill in due time, he should immediately prepare a very full statement of all the facts which he expects will be charged in the defendant's bill, and full instructions for his answer, and have the draft of such answer prepared as far as he can.

We have in the preceding volume stated the practice in obtaining some injunctions. (g) When a bill for an injunction is filed after arrest at law, no injunction is to be granted without bringing the principal sum into Court, except there appear in the defendant's answer, or by written evidence, plain matter tending to discharge the debt in equity; (g) and after a verdict at law for the plaintiff, an injunction cannot in any case be obtained without bringing the amount of the verdict into Court. (h)

So it has been long established that a bill lies, not only for an *injunction to stay proceedings* in an action at law *before judgment*, but also in some cases, and under strong circumstances, to *prevent execution upon a judgment* in any other Court, whether inferior or superior. (i) Thus equity will relieve even after a verdict at law, when the plaintiff knew the fact to be otherwise than what the jury found, and the defendant was ignorant thereof at the trial, (k) and where the defendant at law could not find the receipt for the debt sued for until

(d) 1 Madd. Ch. Pr. 132, 133; Smith's Ch. Pr. 478; *Earnshaw v. Thornhill*, 18 Ves. 488; *Garlick v. Pearson*, 10 Ves. 450; *Mills v. Cobby*, 1 Meriv. 3; 2 Kel. R. 17, pl. 5.

(e) Smith's Ch. Pr. 452, 464; 1 Ves. & B. 366; 1 Sim. & Stu. 102; 1 Sim. 510; 3 Madd. R. 102; *Earnshaw v. Thornhill*, 18 Ves. 488; Chit. Eq. Dig. 1050.

(f) *Legg v. Datasta*, 3 Woode. V. L. 410, 411, in note.

(g) *Ante*, vol. i. 700; Beame's Ord. 15; Smith's Ch. Pr. 457; Chitty's Eq. Dig. 1052.

(h) Smith's Ch. Pr. 457; *Culley v. Hickley*, 2 Bro. C. C. 182; *Sherwood v. White*, 1 Bro. C. C. 453.

(i) Bacon's Works, vol. iv. 611, 682; 1 Chan. Rep. App. 26; 3 Bla. C. 54, 55; *ante*, vol. i. 731, note (u); Com. Dig. Chancery, C. note (m), 5 edit.; Decree in Spiritual Court, *Vanbrugh v. Cock*, 1 Chan. Cas. 200; Admiralty, 1 Hagg. Ad. R. 196, in note.

(k) *Williams v. Lee*, 3 Atk. 223; 2 Ves. 135; *Bateman v. Willoe*, 1 Schol. & Lef. 205; and see 1 Hagg. Ad. R. 196.

CHAP. V.
SECT. VI.

after the trial, equity relieved. (l) So *newly discovered* evidence of fraud may induce a Court of Equity, if not a Court of Law, *to open an award* upon a matter of fact. (m) But in these cases, in order to found a title to relief in equity, it is not sufficient to shew generally that injustice has been done; but it must be shewn specially that the Court of Equity is warranted to interfere; and equity is not so warranted merely on the ground that an unconscientious verdict has been had at law against the plaintiff, if he could by reasonable exertion have laid that ground before a Court of law on the trial. (n) And where a bill was filed, alleging fraud as to quantity and quality of goods sold, but not discovered till they had been exported to America, and that they were there sold at a loss; and that the defendant, being threatened with an action, *paid the original price*, according to the *contract*, under a *protest* that he would seek relief in equity; and praying an account and payment in respect of the loss, and a commission to America, a demurrer to such bill was allowed; because, instead of paying the money, although under protest, the party should have filed a bill for an injunction against the claim of the money, and not having done so, he could not recover back the amount in a Court of Equity any more than he could at law. (o) And in general a party who has mistaken or misshapen his defence at law, cannot apply for relief in equity. (p) Such an injunction is not like a writ of prohibition from a Court of law directed to the other Court or its officer, but merely operates in personam, and prohibits the party to the suit in the other Court from proceeding, and if he do, subjects him to an attachment for his contempt. When a bill for an injunction has been filed, the creditor or claimant should take care, if the statute of limitations would otherwise operate as a legal bar, either at once to commence by regular process his proper action at law, and enter continuance on the roll, or take care to obtain an express decree or order of the Court of Equity, that the defendant shall not hereafter plead the statute of limitations. (q)

Bills of Peace, formerly frequent, were of this nature, and

(l) *Gainsborough v. Gifford*, 2 P. Wms. 424. When a Court of law will not grant a new trial on account of newly discovered evidence, Tidd, 906, 907.

(m) *Eardly v. Otley*, 2 Chitty's R. 42; *Auriol v. Smith*, 1 Turn. & Russ. 127; *Mitchel v. Harris*, 2 Ves. jun. 134; 4 Bro. C. C. 3; *Bateman v. Willoe*, 1 Schol. &

Lef. 205.

(n) *Bateman v. Willoe*, 1 Schol. & Lef. 201, 205; 14 Ves. 31; *R. v. Peto*, 1 Young & Jerv. 169.

(o) *Kemp v. Pryor*, 7 Ves. 237; *Bilbie v. Lumley*, 2 East, 469, at law. S. P.

(p) *Evans v. Solly*, 9 Price, 525.

(q) *Ante*, vol. i. 781.

were sustainable not between two individuals only, but where numerous parties on separate rights were interested. (r) As where a man claims an exclusive right, and the persons who controvert it are numerous, and he can not by one action at law quiet that right, in this case he may file a bill of *peace*, and the Court would direct an issue to determine the right, as between lords of manors and their tenant or tenants of one manor and another; (s) and perpetual injunctions are now frequently granted after several trials at law. (t)

Bills for Relief against Forfeitures, as those occasioned by non-payment of rent, or other sums of money, may also be here arranged. (u)

Bills for relief against Forfeitures.

Somewhat analogous to the equitable jurisdiction of staying an action at law, is the equitable jurisdiction of preventing a *defendant* at law from setting up some formal legal defence, when the so doing would prevent the just investigation of a legal right. Of this description are bills in equity to prevent a defendant in ejectment from setting up an outstanding term, which, though vested in some trustee to attend the inheritance, might otherwise constitute an impediment and ground of nonsuit. (y) So we have seen that by a proper application to a Court of equity in anticipation, a defendant at law may be prevented from pleading the statute of limitations, though the mere pendency of proceedings in equity will not constitute any adequate excuse for delay in commencing proceedings at law. (x) So if a defendant have obtained a release by undue means, a bill may be sustained to defeat the effect of such release, (a) although a Court of law will also in some cases prevent a party using a release so obtained on motion and rule. (b)

Bills for an injunction to prevent setting up outstanding terms or other legal defence. (x)

We have seen the common law and statutory jurisdiction of Courts of law to interfere when there are several adverse

Bills of interpleader. (c)

(r) 2 Atk. 483; 4 Bro. C. C. 157; 3 P. Wms. 156; *ante*, vol. i. 731.

(s) 2 Atk. 483, and Chit. Eq. Dig. Bill of Peace; 3 Bla. 427, in notes; *ante*, vol. i. 726.

(t) 4 Bro. P. C. 373; Chit. Eq. Dig. Practice, Injunction, 5; *Waters v. Taylor*, 2 Ves. & B. 302.

(u) Chit. Eq. Dig. tit. Forfeiture, 454; tit. Compensation, p. 221, 222; when or not a Court of Equity will relieve, *ante*, vol. i. 290.

(x) See in general Chit. Eq. D. 1055; 1 Mad. Ch. Pr. 157.

(y) 1 Mad. Ch. Pr. 157, 158, 201, 202; *Hopkins v. Bond*, 1 Scho. & Lef.

429, 431.

(z) *Ante*, vol. i. 711, 781; *Clarke v. Lubley*, 2 Cox, 173; *Sirdefield v. Price*, 2 Young & J. 73; *supra*, 416.

(a) *Pascoe v. Pascoe*, 2 Cox, 109.

(b) *Mountstephen v. Brook*, 1 Chit. R. 390, and note; 3 B. & Ald. 141; 1 B. & Ald. 224.

(c) See in general Smith's Ch. Pr. 350 to 357; 1 Mad. Ch. Pr. 173; see cases Chit. Eq. Dig. Pleading, 11; Bill of Interpleader, p. 780, 781, 590 and 894; Mitford's Pl. 39; 1 Mad. Ch. Pr. 173; Eden's Inj. 335 to 349; *Cornish v. Tanner*, 1 Young & J. 353.

CHAP. V.
SECT. VI.

claimants. (d) A bill of *Interpleader in equity* will lie to prevent fraud or injustice, where two or more parties claim adversely to each other from a party in possession of personal or real property, so as to prevent them from both suing him, and to compel the two claimants to settle their rights before the person holding possession be required to give up to either. (e) But unless the party still retain possession, he cannot apply for this bill. (f) Thus a captain of a ship, or any agent or party, holding goods or money not for his own use, may file an interpleader, where parties claim adversely under bills of lading, &c. (g) But the defendant must not set up any claim on his own account, and therefore if an action is brought against an auctioneer for a deposit, he cannot file a bill of interpleader, if he insist upon retaining either his commission or the duty, (h) and the defendant must not in any respect have been a wrongdoer; and on that account, where a sheriff had seized goods against a defendant in an execution, and a third person claimed them, he could not have an interpleader, because he must, if the goods were the property of the latter, admit he had made a tortious seizure. (i) But no bill of interpleader will be entertained when the claim is very small, as under 10*l*. (k) And before any proceedings, the party should apply to each other, and if they refuse to indemnify him on reasonable terms, he will recover his costs either as between both the claimants or against him who occasioned the bill. (l) But a bill of interpleader lies, if adverse claims have been made, although no suit has been commenced by either claimant. (m) In equity a party filing a bill of interpleader is entitled to his costs, unless there has been collusion. (n) In some cases, even since the recent act, affording relief at law, it may still be necessary to resort to a Court of Equity; as if the action be not in the form mentioned in the act, or one or more of the claimants is out of the kingdom. Thus a bill of interpleader was sustained, where all the defendants but one resided out of the jurisdiction, i. e. in Scotland, and the plaintiff having shewn that he had used due diligence to bring the parties into Court, was decreed to give up the subject to the only defendant who had appeared, and was

(d) *Ante*, this vol. 341 to 346.

(e) 2 Ves. jun. 310; Mitford's Pl. 39; 1 Mad. Ch. 173.

(f) *Burnett v. Anderson*, 1 Meriv. 405.

(g) *Low v. Henderson*, 3 Mad. 277; see numerous instances, Chit. Eq. Dig. 780, 781.

(h) *Mitchell v. Hayne*, 2 Sim. & Stu. 63; same rule at law, *ante*, 345, 346; *Brad-*

dock v. Smith, 9 Bing. 84; 2 Moore & S. 131; but see the distinction there taken.

(i) *Slingsby v. Bolton*, 1 Ves. & B. 334.

(k) *Smith v. Target*, 2 Anstr. 530; Chit. Eq. Dig. Jurisdiction, 599.

(l) 1 Mad. Ch. Pr. 180, 181.

(m) 15 Ves. jun. 245; 16 Ves. 203.

(n) 1 Sim. & Stu. 462.

protected against the others by injunction, and it was ordered that service on the attorney should be good. (o)

CHAP. V.
SECT. VI.

Bills for discovery. (p)

We have seen that Courts of Law have not (except in the case of summary motions and affidavits in answer) any power or jurisdiction to compel a defendant to *discover* any facts or evidence in favour of the plaintiff, or to compel the plaintiff to admit any facts favourable to a defence, but that a Court of Equity has exclusive jurisdiction in this respect. (q) It, therefore, is frequently necessary to file a bill in equity *merely* for a discovery of facts in aid of the plaintiff or defendant at law, and without *praying relief*, because the facts, when discovered, disclose and establish a *legal* right of action, or a legal ground of defence. (r) In many cases, as those of account, where Courts of Equity and Law have concurrent jurisdiction, and in all cases where the remedy or the defence is peculiarly in equity, then, besides praying an account, &c. the bill may also pray relief. (s) The rule in equity, that a party is not bound to disclose his own case, is confined to mere matter of *title* and criminal acts, and does not extend to matters of account. (t) We have already made some observations upon the nature and utility of a bill for a discovery, (u) and the proceeding will be further noticed in the course of this volume.

The lessor of the plaintiff, in an action of ejectment, may in some cases, as where he claims in part under the same title as that of the defendant, file a bill of discovery to ascertain the grounds upon which the defendant claims; (x) and on the other hand a defendant at law in such action may file a similar bill to discover on what grounds the lessor of the plaintiff is proceeding at law. Thus any person in possession of an estate as tenant or otherwise, may file a bill for a discovery of the title of a party bringing an action of ejectment against him, even though he be himself a wrongdoer against every body; (y) and where an estate is considerable, or the defence at law would be expensive, or it may be important to be prepared to answer the

(o) *Stevenson v. Anderson*, 2 Ves. & B. 407.

(p) As to bills of discovery, Smith's Ch. Pr. 375 to 381, 362, 363; 1 Mad. Ch. Pr. 196 to 218, and *post*.

(q) *Ante*, this volume, 49 to 52.

(r) As to bills of discovery in general, see this volume, *ante*, 54; and as to the antecedent precautionary proceedings as affecting costs, *id.*; and *ante*, vol. 1, 439; and *Weymouth v. Boyer*, 1 Ves. jun. 423.

(s) See in general 1 Mad. Ch. Pr. 196 to 216; Chit. Eq. Dig. Pleading, 778, 780; Practice, 889, 929.

(t) *Corbell v. Hawkins*, 1 Young. & J. 425.

(u) *Ante*, this vol. 49 to 55.

(x) 1 Mad. Ch. Pr. 200 to 206; 13 Ves. 251; Chit. Eq. Dig. Pleading, 761, 778, 1281; but not without shewing in bill that both parties claim under same title; *Mutloe v. Smith*, 3 Anstr. 709; *Baker v. Rooker*, 6 Price, 379; *Joy v. Kekewich*, 2 Ves. jun. 679; *Lowther v. Troy*, 1 Ridg. L. & S. 192.

(y) *Metcalf v. Harvey*, 1 Ves. 248; 1 Mad. Ch. Pr. 206.

CHAP. V.
SECT. VI.

plaintiff's case at law, the filing such a bill may be extremely advisable. But although an heir out of possession is entitled to a discovery of deeds, and some facts necessary to support his legal title, he cannot file a bill merely for the recovery of the possession of the estate or of the title deeds, for they are properly to be recovered at law and not in equity. (z)

Bills for assignment of *Dower* also are proceeded upon in equity, though a writ of dower in the Common Pleas is sometimes preferable, when the husband died seized, in order to recover *damages* and costs, and is one of the ancient actions retained by 3 & 4 W. 4, c. 27, s. 36. (a)

Bills for *Partition* or apportionment between joint tenants and tenants in common, were always sustainable and decreed in equity; (b) and since the abolition of the writ of partition at law, by 3 & 4 W. 4, c. 27, s. 36, such bills are the only mode of effecting a division; and before that act, whenever one of the parties interested was an infant, or when the estate of either was in remainder or reversion, it was always absolutely essential to file a bill. (c) And another advantage attends the proceeding in equity, viz. that in case of any mistake in the division, by which more was allotted to one party than the other, compensation may be awarded by the Court of Equity. (d) But Chancery has no jurisdiction to make partitions between tenants in common of copyhold. (e)

Bills for *Contribution* between sureties we have seen may, in the event of the insolvency of one or more of the sureties, be preferable to an action. (f)

Bills to *establish a Modus* are also cognizable in equity; but a person is not allowed to file such a bill, unless he has been actually disturbed by proceedings at law or in equity, or in the Ecclesiastical Court, as by an action at law against a parishioner for not setting out tithe in kind, in which case the defendant, insisting on a modus, may file such a bill, being in the nature of a cross bill. (g)

(z) *Crow v. Tyrell*, 3 Mad. Rep. 182; *Armitage v. Wadsworth*, 1 Mad. 189; *Pulteney v. Warren*, 6 Ves. 89.

(a) 2 Saund. R. 43, n. 1 to 45, n. 4.; *Mundy v. Mundy*, 4 Bro. C. C. 294; 2 Ves. jun. 122, 128; *Curtis v. Curtis*, 2 Bro. C. C. 620; *Dormer v. Fortescue*, 3 Atk. 130; Chit. Eq. Dig. Dower, 1 Mad. Ch. Pr. 242, 243, &c.

(b) 2 Ves. jun. 124.

(c) 1 Mad. Ch. Pr. 244, 246; 2 Id. 170; Smith's Ch. Pr. 358 to 362; Mitford, 110; Chit. Col. Stat. 624, n. (d);

2 Swanst. 546.

(d) *Dacre v. Gorges*, 2 Sim. & Stu. 454.

(e) *Scott v. Fawcett*, Dick. 299.

(f) When preferable in equity to an action at law, *ante*, 303; *Peter v. Rich*, Chan. Cases, 34; *Brown v. Lee*, 6 Bar. & Cres. 689.

(g) 1 Mad. Ch. Pr. 250, 128; *Gordon v. Simpkinson*, 11 Ves. 510; *Warden of St. Paul's v. Crickett*, 2 Ves. jun. 563; and *Warden of St. Paul's v. Morris*, 9 Ves. 563.

Bills to *Marshal Assets* are exclusively sustainable in this Court, and is the only mode by which, when specialty creditors have exhausted the personal assets, simple contract creditors, and even legatees, may, to the extent of the personal assets so applied, stand in their place. (h) Bills to *Secure Property* in litigation in other Courts, as to compel an executor or administrator to bring the assets into Court, can *only* be filed in a Court of Equity. (i)

Bills to compel the *lord of a manor* to hold a Court, or admit a copyholder, are also sustainable, though the jurisdiction at law in King's Bench by mandamus is in general preferable. (k)

Another mode of preventing fraud is the securing and enforcing the disclosure of evidence. At common law and before the statute 13 G. 3, c. 63, as to *India*, and the general act 1 W. 4, c. 22, only a Court of Equity could, in aid of an action in a Common Law Court, *compel* an obstinate party to a suit to consent to the issuing of a *commission* to examine witnesses abroad on *interrogatories*, and consequently that power constituted an important and valuable branch of jurisdiction in equity; (l) and such jurisdiction still continues, though there will be comparatively little occasion to exercise it. (m)

In aid of other Courts, as by *commission* to examine witnesses on interrogatories.

The care of *Infants* and *their property* has been usually arranged as the *fourth* head of equitable jurisdiction, (n) and which jurisdiction reverted to this Court upon the dissolution of the Court of Wards and Liveries, and in some of the books the prerogative of the king, as *pater patriæ*, is described as if he by the Lord High Chancellor takes care of *all* infants, and the Chancellor might exercise jurisdiction over every infant. But we have seen that the prerogative is never exercised excepting when the infant *has property* to take care of, and then incidentally the person as well as property will be protected, at least after the infant has been constituted a ward of chancery; (o) and we have seen that by a donation of even £5 any infant may be constituted a ward of the Court for all beneficial

4. Infants.

(h) Com. Dig. tit. Chancery, Appendix, Marshalling. In 3 Bla. Com. 427, in notes; 3 Woode. Vin. Lec., the student will find an explicit account of marshalling assets; and see a luminous case, *Aldrich v. Cooper*, 8 Ves. 388, 395; 1 Madd. Ch. Pr. 250.

(i) *Ante*, vol. i. 551, 715, 716; *Sharples v. Sharples*, M'Clel. Rep. 506.

(k) *Ante*, vol. i. 792, 794.

(l) See *ante*, 3 Bla. C. 382, 383, 438, 449; and see the practice as to bills in equity for such commissions, Smith's Ch.

Pr. 377 to 382; Chit. Eq. Dig. tit. Practice, 1017 to 1024; 2 Madd. Ch. Pr. 405; Newl. Ch. Pr. 117.

(m) Smith's Ch. Pr. 381.

(n) 1 Madd. Ch. Pr. 23, 331; Chitty's Eq. Dig. tit. Jurisdiction, x. p. 599, 600; and see 6 G. 4, c. 74, s. 12, *ante*, 408.

(o) *In re Talbot*, coram Lord Eldon, April, 1815, *ante*, vol. i. 64, note (z), 66, 68, 810; Smith's Ch. Pr. 505 to 512; 1 Newl. Ch. Pr. 2d ed. 151; 1 Madd. Ch. Pr. 331 to 360.

CHAP. V.
SECT. VI.

purposes. (p) This jurisdiction over a ward extends beyond the age of twenty-one, and until all the objects of the guardianship have been fulfilled. (q) We have considered much of the jurisdiction over infants in the preceding volume. (r) The consideration of the whole jurisdiction would be too voluminous for this general treatise. (s) With the exception of the interference of a Court of Law under a writ of habeas corpus, which, as regards infants, we have considered, the Chancellor has exclusive jurisdiction over infants and their estates, and the Court of King's Bench has not any of the delegated authority which belongs to the Chancellor, nor has the Court of Exchequer. (t) In many respects *property* belonging to *infants*, *femes covert*, *idiots*, *lunatics*, *persons of unsound mind*, and *persons out of the jurisdiction of the Court of Chancery*, is regulated and guarded by the Consolidating Act, 1 W. 4, c. 65. (u)

5. Specific performance of agreements and other specific relief.

The *fifthly* enumerated branch of equitable jurisdiction is the enforcing *Specific Performance of Agreements*, to which may be added some other instances of *Specific Relief*. (v) This is one of the most peculiar and important branches of equitable jurisdiction, and has been justly considered the most useful, (x) for whilst at law, (excepting in the action of *detinue* for a chattel, and in *ejectment* for the recovery of buildings or land,) *damages* only and not the thing itself can be recovered; (y) yet by bill in equity a decree may be obtained that the complainant shall have from the opponent the precise performance of his agreement in certain cases, and in general the costs of the suit. This jurisdiction is analogous in some respects to the writ of mandamus at law, commanding the party to whom the writ is directed to perform some act; but then such mandamus, as we have seen, is in general confined to public matters or public officers, whilst a bill for specific performance is principally a private remedy. (z) We have in the preceding volume fully stated when a Court of Equity will decree the *specific delivery* of certain chattels, as *heir looms* or *title-deeds*, *specific bequests*, and other articles, (a) and when the *payment of a legacy*

(p) *Ante*, vol. i. 810, 702, n. (c); or even filing a bill, 1 Madd. Ch. Pr. 332.

(q) 3 Swanst. 69.

(r) *Ante*, vol. i. 61 to 71.

(s) 1 Madd. Ch. Pr. 351 to 360; Chitty's Eq. Dig. tit. Infant, 527 to 543.

(t) 2 P. Wms. 118; 1 Madd. Ch. Pr. 331.

(u) See 1 Dowl. Stat. 310 and notes.

(v) See division, *ante*, 408. and in ge-

neral 1 Madd. Ch. Pr. 23, 360 to 444; Smith's Ch. Pr. 367 to 370.

(x) Per Lord Hardwicke, *Penn v. Lord Baltimore*, 1 Ves. 446.

(y) *Alley v. Deschans*, 13 Ves. 222; 1 Madd. Ch. Pr. 360.

(z) See observations, *ante*, vol. i. 787 to 871.

(a) *Ante*, vol. i. 812 to 816.

may be enforced in equity, and when or not that remedy is preferable to a proceeding in the Ecclesiastical Court, (c) and when the delivery of a proper deed or bill or other security may be decreed even against a surety; (d) and we have at great length examined the principles, rules, and decisions governing bills for specific performance of marriage articles and contracts and covenants, (e) so that any further observations in this place would be useless repetition.

Sixthly, The very important and extensive jurisdiction over *Trusts* and *trustees* (including *executors*,) constitutes the last head of the division of equitable jurisdiction, and it is a principal and exclusive branch, and includes not only those *express trusts* created by deed or will, but also those which are *implied* from the circumstance of the party having accepted some office, as that of *executor or administrator*, and the incident jurisdiction over *legacies*, with the power over trustees of different descriptions. (g)

6. Trusts, executors, and legacies. (f)

A cestui que trust, or person beneficially but not legally interested, can in no case sue his *trustee* at law for any misconduct, but must file a bill. (h) But in equity trustees are liable for any abuse of trust, although the deed appointing them contain the usual indemnity clause, as if there be two trustees and both suffer a debt from one of them to remain long outstanding and a loss arise, (i) though where there is an express clause that each trustee shall be liable only for one moiety the Court will not extend the liability. (k) If trustees refuse to act when they ought, the only safe course is to file a bill to compel them; though it is usual at law, if it be necessary to proceed in ejectment on their demise, to tender them an adequate indemnity, or rather draft of an indemnity bond, with sufficient sureties, to secure them against all liability for costs, and then to proceed in an action of ejectment on their demise, or other action at law; after which, if the proceeding be proper and they attempt to impede the recovery, a Court of Equity would subject them to costs and perhaps other loss. This course of proceeding saves the delay and expense of a formal suit in equity to compel them to act.

(c) *Ante*, vol. i. 815, 816; but see a very summary remedy in Eccles. Court, *post*.

(d) *Ante*, vol. i. 123, 304, 710, 711; *Rawstone v. Parr*, 3 Russ. 424, 529.

(e) *Ante*, vol. i. 820 to 871; and see *Analysis*, *id.* 824, 825, &c.; 1 Madd. Ch. Pr. 360 to 444; Smith's Ch. Pr. 367 to 370.

(f) See in general 1 Madd. Ch. Pr.

444, to vol. ii. 163.

(g) See in general, as to the equitable jurisdiction over trusts and trustees, 1 Fonblan. Eq. 9. We have seen that a cestui que trust cannot in general sue at law, *ante*, 6 to 8.

(h) Sanders on Uses and Trusts.

(i) *Mucklow v. Fuller*, 1 Jac. 198; 3 Swanst. 78; Chitty's Eq. Dig. 1310.

(k) *Birls v. Betty*, 6 Madd. 90.

CHAP. V.
SECT. VI.

Executors.

We have seen that to secure a just and equal distribution of assets and prevent an *Executor* from preferring one creditor to another of equal degree, when there are not assets to *pay all* the debts, that it is frequently advisable for one creditor very shortly after the death to file a bill in Chancery or the Exchequer, on behalf of himself and other creditors, against the executor or administrator, requiring him to account and distribute equally, and upon which a proper distribution will be decreed; and, as observed by Sir J. Mansfield, when an executor is pressed by some creditors more than others, it is advisable for him to get some friendly creditor to file such bill, thereby enabling him to secure a just or equal distribution. (l)

Legacies.

Suits for *Legacies* charged upon or to be paid out of *personal* estates were originally and properly cognizable in the Ecclesiastical Courts as a branch of that testamentary jurisdiction which undoubtedly belongs to them; but legatees instituting suits there, finding the authority of those Courts inadequate to enforce a *full discovery of assets*, have been frequently driven into equity for that purpose; and therefore to save a circuitry or multiplicity of suits and in ease of the suitor, Courts of Equity exercised complete jurisdiction in the matter, as well by enforcing the *discovery* as by decreeing *payment* of the legacy, on the ground that the executor was in the nature of a *trustee* for the parties beneficially interested. But in the exercise of this concurrent or preferable jurisdiction Courts of Equity necessarily adopted the law of that forum in which the suit was originally cognizable, and therefore it is that where a suit instituted in equity for payment of a legacy payable out of the personal estate, if a question arise upon the right of the legatee to demand payment, it is governed by the civil law; whereas, if the legacy is charged upon a *real estate* the rules of the common law prevail; because in the latter case the jurisdiction of the temporal Court is original and exclusive. (m) When a *legacy* has been bequeathed to a *married* woman Courts of Equity exercise an exclusive jurisdiction, and will on a bill filed grant an injunction, so as to prevent her husband from proceeding in the Spiritual Court to obtain payment, because the latter Court cannot impose any terms or compel the husband to make an adequate provision or settlement on his wife as the

(l) Per Sir J. Mansfield, in *Brady v. Shiel*, 1 Campb. 148; *Nunn v. Barlow*, 1 Sim. & Sta. 588, *ante*, vol. i. 545.

(m) *Keily v. Monck*, 3 Ridgw. P. C.; 243; *Kendall v. Kendall*, 4 Russ. Rep. 370; *ante*, vol. i. 112. In case of a de-

vise of *real estate* to pay debts, a Court of Equity has exclusive jurisdiction, and an Ecclesiastical no jurisdiction, over the will, as it relates to the *realty*, *Barker v. May*, 9 Bar. & Cres. 489.

Court of Chancery can oblige him to do before he will be permitted to receive the legacy. (n) So where a *father* has instituted a suit in a Spiritual Court for an *infant's* legacy, the Court of Chancery will grant an injunction so as to prevent the money from getting into the father's power. (o) In these cases the proceeding is not by *prohibition*, because the Ecclesiastical Court has jurisdiction, but by injunction operating in personam against the husband and father; and the Court of Equity merely interferes in consequence of its general jurisdiction over trustees and to protect the interest of married women and infants. (p) And in all cases of legacies, where there is a *continuing trust* or *any thing like a trust*, the Court of Chancery will grant an injunction, because trusts are peculiarly proper for the cognizance of that Court. (p)

There is, we have seen, a great advantage in favour of a *creditor, or legatee or next of kin* proceeding in a Court of Equity, either Chancery or Exchequer, by bill *against an executor or administrator*, than in the Ecclesiastical Court, because in the former the fund may be secured in Court, and the executor's account and oath are not conclusive, (q) and a legatee instituting such a suit will be entitled to costs out of the estate. (r) Besides, when legacies are charged upon *real* property the Ecclesiastical Court has no jurisdiction whatever, and in that case the only remedy is in this Court. (s)

Thirdly, is the *Statutory Jurisdiction* of this Court under several express enactments, as 1st, constituting the Court of Chancery a Court of Review, (as formerly the Delegates, now repealed and vested in the judicial committee of the Privy Council, under the 2 & 3 W. 4, c. 93, and 3 & 4 W. 4, c. 41); 2dly, formerly a Court of bankruptcy, under the then existing Bankrupt Acts; but which jurisdiction has been principally

Thirdly, The statutory jurisdiction of the Chancellor and Chancery. (t)

(n) *Jewson v. Moulson*, 2 Atk. 420; *Blount v. Bestland*, and *Meals v. Meals*, 5 Ves. 517; 1 Madd. Ch. Pr. 129, when or not Chancery will oblige husband to settle legacy left to his wife, *Harrison v. Buckle*, 1 Stra. 239; *Ranking v. Barnard*, 5 Madd. 32; *Campbell v. French*, 3 Ves. 323; Chitty's Eq. Dig. 510, 519 to 523, 639; when or not a legacy is considered given to a married woman for her separate use, *id. ibid.*; *Norris v. Hemingway*, 1 Haggard's Rep. 4, and *ante*, vol. i. 61; a husband cannot sue at law, *Macaulay v. Phillips*, 4 Ves. 19; and why, *ante*, vol. i. 7.

(o) *Rotherham v. Fanshaw*, 3 Atk. 629; 1 Madd. Ch. Pr. 130. A personal legacy

given to an infant is more properly cognizable in Chancery than in the Ecclesiastical Court, *Harrell v. Walden*, 1 Vern. 26.

(p) *Anonymous*, 1 Atk. 491; *Stonehouse v. Stonehouse*, 1 Dick. 98; 1 Madd. Ch. Pr. 130.

(q) *Ante*, vol. i. 816; *Redes. Tr. Pl.* 110; 2 Mad. Ch. Pr. 3; *Sharples v. Sharples*, M'Clel. R. 506.

(r) *Sharples v. Sharples*, M'Clel. R. 506; as to costs of such a suit in general, 2 Mad. Ch. Pr. 557.

(s) *Barker v. May*, 9 B. & C. 489; *ante*, vol. i. 112, note (e), and 816.

(t) See division, *ante*, 405; 1 Mad. Ch. Pr. 1, 2, 586 to 723.

CHAP. V.
SECT. VI.

transferred to the Bankruptcy Courts, and to the principal of those Courts being the Court of Review, by 1 & 2 W. 4, c. 56, but affording an appeal on a case stated to the Chancellor; 3dly, the statutes relative to *charitable* uses; (u) 4thly, the arbitration acts; 5thly, the friendly societies acts; (x) and 6thly, various other acts.

Fourthly, The specially delegated jurisdiction. (y)

Fourthly, are the *specially delegated* branches of *jurisdiction*, as that relating to *idiots* and *lunatics*, which is vested in the Chancellor or the Court of Chancery exclusively by various statutes, ancient and modern, (z) excepting as regards the power to apprehend a lunatic to prevent mischief, which we have stated, (a) and some regulations of a general nature relative to pauper lunatics. (b) So in case justices of the peace should refuse to grant a licence to a party to keep a lunatic asylum, he may petition the Chancellor not to sanction such refusal. (c)

The principal peculiarities in the jurisdiction of Courts of Equity.

Having thus given an outline of the principal instances in which the Chancellor or the Court of Chancery has jurisdiction, we will now notice what circumstances *particularly distinguish* this Court and jurisdiction from the Courts of Law. It is difficult to state which of these several subjects is the most important branch of jurisdiction, but perhaps the principal are the exclusive jurisdiction over cases strictly of *uses and trust* not executed *at law*, and in which a Court of Law cannot directly recognize the beneficial interest of the cestui que trust, and which more particularly relate to *real* property and proceedings against *trustees*, where Courts of Equity have exclusive jurisdiction. We have seen that Courts of Law will not in general

(u) See Chit. Eq. Dig. Jurisdiction, xii. p. 601; and *id.* tit. Charity. The 57 G. 3, c. 39, empowers the Court of Chancery to make *summary orders* without suit in matters of charity, or benefit or friendly societies. *In re Friendly Society*, 1 Sim. & Stu. 82.

(x) See the older acts and decisions, 2 Mad. Ch. Pr. 718; 1 Montague Bankr. L. The 10 G. 4, c. 56, s. 15, and 4 & 5 W. 4, c. 40, appears to relieve this Court from any statutory duties, Chit. Eq. Dig. 602. Although the Chancellor may still have much superintending jurisdiction, as over other trusts and matters of account between partners, &c.

(y) See division, *ante*, 405; 1 Mad. Ch. Pr. 1; 2 *Id.* 723 to 757.

(s) See the older statutes and decisions 2 Mad. Ch. Pr. 723 to 757; 1 W. 4, c. 60 and 65; 1 Dowl. Stat. 310; 2 & 3 W. 4, c. 107; 3 Dowl. Stat. 677, and notes; 3 & 4 W. 4, c. 36, for diminishing expenses of commissions de lunatico inquirendo; and see *Grosvenor v. Drax*, 2 Knapp, 82.

(a) *Ante*, vol. i. 670, 671; 1 Newland Ch. Pr. 163, 2d edit.; Chit. Eq. Dig. Jurisdiction, xi. p. 601, and tit. Lunacy.

(b) *Ibid.*; *ante*, vol. i. 826; and Burn's J. tit. Lunatics.

(c) *In re Taylor*, Court of Chancery, 24 July, 1834. But see in general that Chancery has no jurisdiction over justices of peace excepting to place them in office, &c. 2 Mad. Ch. Pr. 720, 721.

take notice of *mere equitable rights*, or at least will not exercise any jurisdiction over trustees, for adequate reasons stated in a preceding page, (d) and that even if a judge of a Court of Equity send to a Court of Law a case stated as *a trust*, the judges of the latter will decline answering it, considering equitable questions as not properly within their jurisdiction. (e) Hence the great importance of keeping in view the distinctions between legal and equitable rights, interests and estates, and legal and equitable injuries and remedies; the principal rules relating to which as regards the proper remedies will be found stated in the preceding volume. (f)

The next most important and exclusive jurisdiction is in the various instances of *injunction bills*, anticipating and preventing injuries, and either having no relation to suits or seeking to stay or modify suits in another Court. With respect to injunctions it would be desirable if Courts of Equity, or at least some Court, exercised a power not only to restrain or prevent *all* expected injuries and crimes, but which jurisdiction we have seen the Court of Chancery disclaims, (excepting merely in the protection of an infant or a libel interfering with the proceedings of the Court.) (g) On the other hand it has been a frequent observation, that this being a jurisdiction interfering with inventions beneficial to the community, ought therefore to be exercised *with great caution*, (h) and it would be desirable that some security against the injury and damages occasioned by an ultimately untenable injunction should be afforded, as a bond with sureties conditioned for the prosecuting the injunction with effect or paying all costs and a sum sufficient to cover the utmost damages; for not unfrequently it has occurred that upon a summary application for an injunction the same has been granted, and afterwards, on the hearing of the cause, been dissolved as groundless, whilst in the mean time the sale of the book or invention has been entirely suspended and become comparatively useless, and the injured party has at present no remedy. (i) Unless the infringement of a copyright or patent

(d) *Ante*, vol. i. 6 to 8, 24.

(e) *Ante*, 351, this volume.

(f) *Ante*, vol. i. 363 to 373; 2 Mad. Ch. Pr. Index, Trusts.

(g) *Ante*, vol. i. 697. At law, excepting in the case of a threatened battery or breach of the peace, there is no adequate preventive remedy.

(h) *Crowder v. Tinkler*, 19 Ves. 618.

(i) In ——— v. ———, A. D. 1833, an injunction was granted to restrain the publication of a work on the Practice of

the Law, but the injunction was afterwards dissolved on hearing of the cause. In the mean time, however, such great alterations in the law had taken place that the work had become of no value *without great additional labour and expense*, and yet the author had no remedy for the injury, for no instance is known of an action on the case for an unfounded injunction obtained *ex parte*. It is submitted, that before hearing of a motion for injunction the party applying should execute a bond

CHAP. V.
SECT. VI.

will inevitably ruin the same or the proprietor, it should suffice that *security* for accounting for and paying any damages should be given until the final hearing of the bill. So although it may be fully established that there is a complete and decided defence in equity on the merits, the Court of Equity will, at least, sometimes not grant an injunction to stay trial or proceedings at law, but on the terms of the defendant at law bringing the whole sum sued for into Court, which it may be impossible or highly prejudicial for him to do, and when it might suffice if he found reasonable *security* for the payment in case a Court of Law or Equity should ultimately decide against him. (k) The full extent of the jurisdiction by injunction has been examined in the preceding volume, and to which we must refer. (l)

The other most important branch of jurisdiction exclusively vested in the Courts of Equity is the power to decree *specific performance* of a contract, or the delivery of a specific chattel or legacy or other specific relief, and which occupied a considerable part of the preceding volume, and to which we must also refer, (m) and the practice relative to which we have also there investigated. (n)

Other pecu-
liarities.

Other *peculiarities* in the equitable jurisdiction of the Chancellor are, as they assist a *complainant* or a *defendant at law*; thus in favour of a complainant they are, first, the compelling a defendant, in aid of a suit or proceeding in a Court of Law, upon bill filed, to *discover* or deny in particular, upon his oath, *material facts* charged in the bill to have taken place, but which the complainant might otherwise be unable to prove; a jurisdiction which does not exist at law nor in general in an Ecclesiastical Court, excepting that when a party in a Court of Law obtains a rule nisi on a summary proceeding, he thereby in effect compels the party either to shew cause or to suffer the rule to be made absolute or to disclose the facts upon which he relies by his affidavits at the risk of an indictment for perjury, either of which proceedings, if the merits be favourable to the complainant, at once may lead to the attainment of justice. But a bill in equity for a discovery is not sustainable merely in aid of the *Ecclesiastical* Court against *executors*, because the latter Court has power itself to come at the discovery without such assistance. (o)

with substantial sureties, in the nature of the bond executed by a petitioning creditor before a fiat in bankruptcy. See the observation of Sir J. Degge relative to prohibitions, *ante*, 357.

(k) *Ante*, vol. i. 709.

(l) *Ante*, vol. i. 700, 701.

(m) *Ante*, vol. i. 825 to 868.

(n) *Ante*, vol. i. 862 to 868

(o) 1 Atk. 288; Chit. Eq. Dig. Prac.

Another peculiarity is the *mode of investigating or trying facts*, viz. instead of a trial by jury the investigation proceeds upon *affidavits* or by written *depositions* in answer to *written interrogatories* administered to witnesses, and upon which the Chancellor or equity judge may, if he think fit, finally decide without the intervention of a jury; (*p*) though he may and ought, if the matter of fact continue doubtful, direct an issue to be framed and to be tried by a jury at law before a judge of one of the superior Courts. (*q*)

Another peculiarity is, that upon the hearing of a cause the Chancellor and other Courts of Equity we have seen may, in aid of his conscience, as it is termed, before decree or order, direct *a case to be stated to the judges* of one of the Courts of law upon a question of law, (*r*) or an *issue* or *an action* to ascertain a question of fact. (*s*) A Court of Equity may make *interim orders* in all cases upon affidavits, and after answer the cause may be brought to a hearing and decree, without directing an issue to be tried, except in the cases of a bill by an *heir*, and a *rector or vicar*; for in general and subject to those two exceptions, the direction of an issue by a Court of Equity is in its discretion, and its object being solely to institute further inquiry for the better information of the Court itself, the order for the trial of an issue is *ex mero motu*. (*t*)

The proceedings in Chancery and other Courts of Equity, like those at law and in other Courts, are either *formal* or *summary*, and numerous statutes expressly give summary powers. The formal suits are by filing a bill and compelling the defendant's appearance by *subpœna* to answer, (and which may be enforced by attachment for the contempt in not appearing, but which contempt may be discharged under 2 W. 4, c. 58,) and in some cases immediately after filing the bill upon proper affidavits; and before answer the complainant may move for an *injunction*. (*u*) In general the defendant *answers* the bill, and issue is then joined, and witnesses are examined, and the cause proceeds to a *hearing* and *decree*, and which, in case of non-compliance, can in general only be enforced by *attachment*,

Course of proceedings in Equity Courts are formal or summary.

Discovery; as to bills of discovery, see 1 Mad. Pr. 196 to 216; and see further as to bills of discovery, *ante*, this volume, 54.

(*p*) *Bullen v. Michel*, 2 Price, 399; 4 Dow, 318, 320, 329; but in the cases of a bill filed by an heir or a rector or vicar, the party has a right to an issue, *id*.

(*q*) *Hampson v. Hampson*, 3 Ves. & B. 48; Chit. Eq. Dig. Jurisdiction, v. p. 593.

(*r*) As to stating a case, *ante*, 350 to 352.

(*s*) 2 Mad. Ch. Pr. 474; *ante*, 352.

(*t*) *Bullen v. Michel*, 2 Price, 399; and *Peake v. Highfield*, 1 Russ. R. 559; 2 Mad. Ch. Pr. 474, as to the general rule and exceptions.

(*u*) *Ante*, vol. i. 700. If the defendant be attached for contempt in not appearing or other contempt and escape, an action lies against the officer. *Blower v. Hollis*, 3 Tyrw. 356.

CHAP. V.
SECT. VI.

which occasions perpetual imprisonment unless the defendant obey, (x) or the Court should discharge him under 2 W. 4, c. 58; and in some cases a *writ of assistance*, (which is in the nature of a writ of *haberi facias possessionem at law*,) may be issued to deliver the possession to the party entitled under the decree. (y) It seems that, although in strictness there must be the same certainty as to parties and number of complainants on a bill in equity as in an action at law, and all who ought must sue, and no uninterested party should be joined, or the bill will be demurrable; (z) yet in equity the consequences of omitting a necessary party are not absolutely so fatal as at law, for in equity, if an essential party who has an interest be omitted as a complainant, the objection may be cured at the hearing by the undertaking of the plaintiff to give full effect to the utmost rights which the omitted party could have claimed, provided those rights would not affect the rights or the defence of the defendant. (a)

Summary applications are usually by *motion*, supported by affidavits, and upon which both parties are heard and an *order* made; (b) but what can be done on motion may also be effected by *petition*. In general all applications for payment of money, or where a detailed statement is requisite to attain the object, a *petition* is preferred. All applications for special injunctions during the long vacation are made on *petition*. No original affidavit can be read in Court, but it must be previously filed, and an office copy produced in Court on the hearing of the motion or petition. When a *summary* or particular jurisdiction has been given by statute, the precise course of proceeding there directed must be pursued, the same as we have observed is essential in Courts of law. (c)

It seems that a party entitled to proceed by motion in a Court of Equity under various statutes authorizing summary application, is not thereby precluded from filing a bill in equity to obtain the same object, if with a view to saving *his right of appeal* or for other reasons it should be considered the more advisable course; (d) and this seems to be analogous to the decision at law, viz. that the Assessed Tax Act, 43 G. 3, c. 99, s. 36, giving an appeal to two commissioners, does not take away the

(x) *Ante*, vol. i. 865; *Blower v. Hollis*, 3 Tyrw. R. 356.

(y) *Ante*, vol. i. 865, 701.

(z) *The King of Spain v. Machado and others*, 4 Russ. R. 225, 228 to 236, 240 to 242, 562; *Harvey v. Cook*, 4 Russ. R. 34, 54, 55.

(a) *Harvey v. Cook*, 4 Russ. R. 34.

(b) 2 Mad. Ch. Pr. 580, 581; see a proceeding by *petition* and affidavit for an injunction, *ante*, vol. i. 700, 701.

(c) *Baynes v. Baynes*, 9 Ves. 462.

(d) *Wall v. Attorney-General*, 11 Price, 643.

jurisdiction of the superior Courts to try the validity of a seizure for taxes by action. (e)

CHAP. V.
SECT. VI.

With respect to the jurisdiction of a Court of Equity to interfere in cases of *annuities*, the 53 G. 3, c. 141, s. 1, enacts, that if there be not a proper memorial as thereby required, the deed, bond, instrument or other assurance, shall be null and void to all intents and purposes, but is silent as to the Court to be proceeded in; and the 6th section, authorizing summary proceedings, only names the Court in which the *action* is brought. But still a Court of Equity by its general jurisdiction has power to decree that annuity deeds, when void, shall be delivered up to be cancelled, and a re-conveyance executed, and therefore unless the case can be brought within the 6th section of the act, it is most advisable to resort to a Court of Equity. (f) The 5th section of the Annuity Act, 53 G. 3, c. 141, gives a judge of King's Bench or Common Pleas summary power to compel the production of the original annuity deeds and examination with a copy, but singularly no such power is extended to a baron of the Court of Exchequer or to a judge of a Court of Equity. A Court of Equity cannot on *motion* order the delivery up of an annuity deed void for omission in the memorial, but the proceeding must be by *bill* filed. (g)

Annuity deeds.

As regards submissions to arbitration and awards, the jurisdiction has been altogether transferred, by the 9 & 10 W. 3, to the Court of which the submission is made a rule of Court, and awards of that nature must be regulated by that statute with respect to the period within which the application must be made to set them aside, and it rather seems that a case of fraud does not, even in a Court of Equity, constitute any exception; (k) and there is no jurisdiction in equity by injunction to stay proceedings at law upon an award made under a rule of a common law Court under the statute 9 & 10 W. 3, c. 15. (l) Although the statute speaks only of Courts of *Record*, and the Court of Chancery, as regards its equitable jurisdiction, is not a Court of Record, yet it is clear that a submission to arbitration may be made an order of a Court of Equity, and the award enforced by attachment or set aside precisely as in one of the superior Courts of Law. (m)

Arbitrations
and awards. (i)

(e) *Earl Shaftesbury v. Russell*, 1 B. & C. 666; 3 Dowl. & Ry. 84.

(f) *Holbrooke v. Sharpley*, 19 Ves. 131; 10 Ves. 218; *Dupuis v. Edwards*, 18 Ves. 358; *Ware v. Horwood*, 14 Ves. 28; 10 Ves. 200; *ante*, vol. i. 710; and Chit. Eq. Dig. tit. Annuity; *ante*, 331.

(g) *Ibid.*

(i) See in general, *ante*, 124; 2 Mad. Ch. Pr. 712; Chit. Eq. Dig. tit. Arbitrator.

(k) *Auriol v. Smith*, 1 Turn. & Russ. 126.

(l) *Gwinnett v. Bannister*, 14 Ves. 530.

(m) *Ante*, this vol. p. 124, and 2 Mad. Ch. Pr. 712.

CHAP. V.
SECT. VI.Summary juris-
diction over
solicitors. (n)

Upon principle it would seem that the Court of Chancery or the equity side of the Exchequer must have an *equal summary jurisdiction* over solicitors as we have seen Courts of Law have, and would proceed on the same principle in the exercise of such jurisdiction. We have, in the early part of this volume, considered the professional education, qualifications, admission, duties, rights and privileges of attornies and solicitors. (o) We have also stated the cases in which a Court of *Law* will interfere summarily against an attorney for *misconduct*, although they will not for mere negligence, but in the latter case leave the client to his remedy by action; (o) and that as regards the jurisdiction to tax costs at common law, independently of the statute 2 G. 2, c. 23, the decisions at law are discordant. (p) The decisions and rules in equity respecting *solicitors* are nearly to the same effect. (q) The Court of Chancery will compel a solicitor to deliver his bill of costs and deeds and papers, although there be no cause depending. (r) So they have jurisdiction to prevent a solicitor from abusing the confidence reposed in him and prevent him from acting against his former client in a matter where, in consequence of his prior employment, he acquired information which he would use against him; (s) and if a solicitor has been guilty of malpractice in bankruptcy, the motion to strike him off the rolls may be made to the Court of Chancery, though not in the matter of the bankruptcy. (t) So if a solicitor falsely represent that an injunction has been obtained, he may be struck off the rolls; (u) and if a solicitor assist his client in obtaining a fraudulent release, he may be properly made a party in a suit to defeat it. (x)

It is stated in one case that a solicitor was fined 20*l.* for forging counsel's name to a scandalous answer, (y) and that upon an attorney or solicitor appearing to have been guilty of gross neglect, the Court will order him to pay the costs. (z) And although in one case the Court is reported to have granted an attachment against a solicitor for negligence; (a) yet in a very recent case, the Vice-Chancellor refused to entertain a petition by a client against his solicitor even for gross negligence in

(n) See in general, *ante*, this volume, 1 to 45, 47 to 71, 339, 340; Chit. Eq. Dig. tit. Solicitor; Smith's Ch. Pr. 528 to 533, &c.

(o) *Ante*, §38 to §40.

(p) *Ante*, 340. It seems also unsettled in equity, Beames, 255, 256; Smith's Ch. Pr. 537.

(q) See Smith's Ch. Pr. 533.

(r) *In re Murray*, 1 Russ. 519; *Ex parte Furl Urbridge*, 6 Ves. 425.

(s) *Ante*, vol. i. 705; and *Grissell v. Peto*, 9 Bing. 1; *Earl Cholmondely v. Lord Clinton*, Coop. 80.

(t) *Ex parte Lowe*, 1 Gl. & J. 78.

(u) *Kimpton v. Eve*, 2 Ves. & B. 352.

(x) *Bowles v. Stewart*, 1 Schol. & L. 227.

(y) *Whitlock v. Marriot*, Dick. 16.

(z) *Fawkes v. Pratt*, 1 P. Wms. 593.

(a) *Flood v. Mangle*, 3 Atk. 568; Dick. 129.

suffering a bill to be dismissed with costs, but left the client to bring his action at law if so advised. (*b*)

So the Court will not exercise its summary jurisdiction to compel a vendor's solicitor to perform an undertaking, unconnected with any pending suit, as given by him at the sale of an estate to do certain acts for clearing the title; (*c*) though a solicitor has been ordered to pay all the costs occasioned by his refusing to appear for a defendant at the hearing, pursuant to his undertaking, and the costs of the application, because the latter was given in connection with a suit. (*d*)

With respect to a *solicitor's costs*, it seems to have been the opinion of Mr. Beames, in his Treatise on Costs, that the Chancellor has summary jurisdiction to order his bill for costs incurred in that Court to be taxed independently of the enactment in 2 G. 2, c. 23, s. 23; (*e*) but as the decisions at law upon that point are contradictory, this question cannot be considered settled. (*f*)

The Court of Chancery we have seen has not, or at least *will not exercise directly any criminal* jurisdiction even to prevent, much less to punish crime, (*g*) unless perhaps to protect an infant, (*h*) or where a party is vexatiously proceeding as well in equity as criminally, in which case he may be compelled to elect and abandon one; (*i*) and this Court has no cognizance of a libel, unless it constitute a libel upon or abuse of proceedings depending in that Court or the suitors; (*k*) and this Court will not compel a discovery in aid of criminal proceedings. (*l*) But although a Court of Equity has no general jurisdiction to enjoin or regulate proceedings upon indictments, yet circumstances may give it, as where prosecuted by relators in an information or plaintiffs in a suit in equity, they are subject to controul by order personally affecting them, but not the defendants. (*m*) Nor has the Court any jurisdiction over matters of *prise*, unless there be a trust; (*n*) nor as a Court of appeal from the decisions either of the Privy Council or the commissioners under the acts and conventions for indemnifying British subjects from the confiscation of their property by the French

When the Court of Chancery has no jurisdiction or will not exercise it.
Not to prevent crimes.

(*b*) *Frankland v. Lucas*, 12 Nov. 1831, Smith's Ch. Pr. 533.

(*c*) *Pearl v. Bushell*, 2 Sim. 38.

(*d*) *Cook v. Broomhead*, 16 Ves. 133.

(*e*) Beames on Costs, 255, 256, 262; Smith's Ch. Pr. 537.

(*f*) *Ante*, 340.

(*g*) *Ante*, vol. i. 697 to 700.

(*h*) *Ante*, vol. i. 697 to 699; 2 Swanst. 418.

(*i*) *Ante*, vol. i. 699, 700; 18 Ves. 220.

(*k*) 2 Atk. 469; *ante*, vol. i.

(*l*) *Ante*, vol. i. 700, 708; 2 Ves. 398.

(*m*) 18 Ves. 220.

(*n*) *Ante*, vol. i. 818; 2 Mad. Ch. Pr. 288; *Parker v. Toulmins*, 1 Cox, 265.

CHAP. V.
SECT. VI.

revolutionary government, (o) unless in case of a trust. (p) Nor will a Court of Equity entertain a bill to rescind the orders of the Court of Exchequer, as a Court of Revenue, nor interfere in a matter which the Exchequer, as a Court of Revenue, was competent to decide. (q)

When *commissioners* or persons (as under the Acts for redemption and sale of the Land Tax, 42 G. 3, c. 116, s. 154,) act merely ministerially, there is consequently no remedy against them in a Court of Equity, but only either by mandamus in the King's Bench (which is doubtful, unless to compel them to grant certificates to persons proposing to purchase,) or a suit in the Exchequer, in such cases as are specially provided for by the act; (r) and when there is a preferable remedy at law by mandamus or quo warranto, this Court will not interfere. (s)

When not over
marriages. (t)

The *Spiritual Court* has exclusive cognizance of the rights and duties arising from the *marriage* state, and Courts of Equity, therefore, have no jurisdiction upon a contract for separation; (x) and though a Court of Equity has jurisdiction to decree the specific performance of an agreement between husband and wife for a separation and separate maintenance, (x) yet the *legality of marriage* cannot be determined in a Court of Equity, especially after sentence in the Spiritual Court, in *causa jactitationis matrimonii*; and this, although the proceedings there were only a feint and collusive; (y) and the fact of a marriage, if charged in a bill in equity, and denied by the answer, there being evidence in the cause, must be tried at law by a jury. (z) But equity has incidentally jurisdiction, as where a *trust* has been created; and therefore though a Court of Equity has no immediate jurisdiction over a contract for separation, yet it has where a third person has covenanted to indemnify the husband against the wife's debts, or where a fortune accrues to the wife after separation. (a) So a Court of Equity will in some cases decree a wife alimony, though she have a sentence for it in a Spiritual Court, (b) and the Court of Chancery and the Master of the Rolls or Vice-Chancellor may secure the payment of alimony allowed by the Ecclesiastical Court by *ne exeat*; (c) but in general equity will not decree alimony, except where there has

(o) *Hill v. Reardon*, 2 Sim. & Stu. 431.
(p) 2 Russ. 608; *ante*, vol. i. 818.
(q) *Dillon v. Buxton*, 3 Ridg. P. C. 80; *post*, 453, 454.

(r) *Williams v. Steward*, 3 Meriv. 472.
(s) *Attorney-General v. Reynolds*, 1 Eq. Ab. 151; *ante*, 379, 380; *post*, 437, n. (m).
(t) See in general Chit. Eq. Dig. tit. Jurisdiction, vii. p. 598.

(u) *Legard v. Johnson*, 3 Ves. 352.

(x) *Fletcher v. Fletcher*, 2 Cox, 99.

(y) *Hagfield v. Hatfield*, 5 Bro. P. C. 100; 3 Ves. 352; Chit. Eq. Dig. vol. i. 598, where see exceptions.

(z) *Revil v. Fox*, 9 Ves. 269.

(a) *Supra*, note (y).

(b) *Angier v. Angier*, Pre. Chan. 496; Gilb. Eq. R. 152.

(c) *Ante*, vol. i. 731 to 733; 3 Atk. 295; 11 Ves. 526.

been an agreement between the parties. (*d*) Where a ward of the Court has been married, if the Master should report that the marriage was invalid, a second marriage may be ordered by the Court, (*e*) although the statutes 58 G. 3, c. 81, and 4 G. 4, c. 76, s. 27, prohibit any suit in an Ecclesiastical Court to compel marriage.

There are cases in which a Court of Equity have decreed *alimony* to the wife; but it should seem that equity has no proper jurisdiction over the subject, except upon an *agreement* between the parties. (*g*) However, we have seen that in some cases equity will, by writ *ne exeat regno*, restrain the husband from quitting the kingdom to evade payment of an agreed or decreed allowance. (*h*) In other cases alimony should be proceeded for in an Ecclesiastical Court. (*i*)

Nor has this Court any jurisdiction to determine on the *validity* of a *will*, either of real or personal property, on the ground of *fraud*, or otherwise; the validity of a devise of *real property* must be determined by a jury, and the validity of a will of personalty can be decided upon only in the Ecclesiastical Courts. (*k*) But pending litigation in the Ecclesiastical Court, a bill for an account and receiver is sustainable. (*l*) If a probate be obtained by *fraud*, (over which peculiarly Chancery has cognizance,) then that Court may interfere by injunction, &c. (*m*) Where the question in the cause appeared to be between persons in their ecclesiastical capacity, Chancery will not interfere, but leave it to the Ecclesiastical Court, as being the proper tribunal to determine it. (*n*) But *mistakes*, apparently on the face of a will, may be rectified in equity, (*o*) and ambiguities in technical terms may be explained by parol evidence of scientific persons; (*p*) and Courts of Equity have exclusive jurisdiction over a devise of *real estate* to pay debts. (*q*)

(*d*) 1 Fonb. Eq. 105; 1 Ch. Rep. 24, 87, 99, 118; 1 Chas. Cas. 150; 2 Atk. 96; 3 Atk. 548; 2 Vern. 386, 761; 3 Bro. Ch. R. 614; *post*, *Alimony*.

(*e*) 8 Ves. 74; 8 Com. Dig. 1035; and see 1 Mad. Ch. Pr. 347, as to the jurisdiction of the Court of Chancery over its wards.

(*f*) When the Court of Chancery will decree allowance in nature of alimony, &c. Chit. Eq. Dig. Husband and Wife, 522.

(*g*) 1 Fonb. Eq. 205; 1 Chan. R. 24, 87, 99, 118, 150; 2 Atk. 196; 3 Atk. 548; 2 Vern. 386, 761, 752; 3 Bro. Ch. R. 604; Lit. R. 78; Wood's Inst. 62; *Augier v. Augier*, Prec. Ch. 496; Gilb. Eq. R. 152.

(*h*) 3 Atk. 295; Dick. 143; *supra*, 434; *ante*, vol. i. 732; but see 1 Ves. 94; 11 Ves. 526.

(*i*) *Post*, *Ecclesiastical Courts*.

(*k*) *Warwick v. Gerrard*, 2 Vern. 8, 76; *Jones v. Jones*, 3 Meriv. 2; *Pemberton v. Pemberton*, 13 Ves. 297; 1 Chit. Eq. Dig. 597.

(*l*) *Atkinson v. Hensham*, 2 Ves. & B. 85; *Ball v. Oliver*, *id.* 96.

(*m*) *Barnesley v. Powell*, 1 Ves. 287.

(*n*) *Clare Hall v. Orwin*, Dick. 457.

(*o*) 1 Mad. Ch. Pr. 80 to 85; 1 Swanst. 28; 5 Mad. 208, 216, 451.

(*p*) *Ante*, vol. i. 112.

(*q*) *Barker v. May*, 9 Barn. & Cres. 189.

CHAP. V.
SECT. VI.

Not if the remedy be at law, &c., unless Equity has a concurrent and equal jurisdiction.

Bills and suits by *legatees* have already been adverted to, (r) and the remedy in the Ecclesiastical Court will presently be fully stated.

If it appear upon the face of a bill filed that the *complainant's right* as well as remedy are only *legal* or cognizable *only* in a Court of *Law* or Admiralty, or a Court of Prize, and not remediable in the Court of Equity, then the latter Court *has no jurisdiction*, and the defendant may demur to the bill; (s) and no suit lies in equity for a sum of money certain and recognized to be due or agreed to be paid by contract, especially when by specialty; (t) nor can a bill be filed in any respect to enforce a personal contract, excepting in a few cases noticed in the previous volume, or merely for discovery of evidence in aid of an action at law, and not praying relief. (u) Nor is a bill sustainable for mesne profits, or for compensation for waste recoverable at law, unless there was some impediment, as infancy; (x) and we have seen that an heir cannot sustain a bill to recover the possession of an estate or title deeds, though he may in certain cases for a discovery merely in aid of proceedings at law; (y) and in one case, upon a bill having been filed in equity, for payment of a promissory note, which was not originally negotiable, and which had been cut in half and one part lost, and the bill tendered an indemnity, the Master of the Rolls seemed to think "that the plaintiff might recover at law, and therefore he was afraid of breaking in upon *the rules established as to the jurisdiction of the Courts, that where a party can recover at law, he ought not to come into equity*;" (z) and although a Court of Equity will on bill filed set aside or restrain a debtor from pleading or using a release obtained by undue means, yet it will not decree payment of the legal debt upon such a bill. (a) A Court of Equity cannot in general *relieve* by decreeing compensation for nonperformance of an agreement or contract merely relating to personalty, and such damages must be proceeded for at law; (b) and where a bill was filed to recover money upon a policy of insurance, the defendant demurred, because the remedy was only at law. (c) There are,

(r) *Ante*, 424, 425; Chit. Eq. Dig. Jurisdiction, 597.

(s) *Hawshaw v. Parkins*, 2 Swanst. 546; 2 Mad. C. P. 170, 171, 288; *Campbell v. French*, 2 Cox, 366; *French v. Connelly*, 2 Anst. 454; Cary's Rep. 15, 20.

(t) *Holles v. Carr*, 3 Swanst. 644; *ante*, vol. i. 858.

(u) *Ante*, vol. i. 850 to 860.

(x) 6 Ves. 88; *aliter*, if equitable waste, 1 Mad. 116.

(y) *Ante*, 54; *Crow v. Tyrell*, 3 Mad. R. 182.

(z) *Mossop v. Eadon*, 16 Ves. 430; In *Hansard v. Robinson*, 7 Barn. & Cres. 90; and *Macartney v. Graham*, 2 Simon's R. 285; *Mossop v. Eadon* appears to have been doubted; but it will be found well decided, because as the lost note was not negotiable, no third person could have sued upon the same, and therefore the remedy was at law.

(a) *Pascoe v. Pascoe*, 2 Cox, 109.

(b) *Clinan v. Cooke*, 1 Sch. & Lef. 25.

(c) *Chekuff v. London Assurance Company*, 4 Bro. P. C. 436.

however, a few exceptions. (*d*) And where a Court of Equity has *concurrent* and equal jurisdiction, a bill there may be sustained. (*e*) And although there might originally have been an objection to a bill filed in a Court of Equity for want of jurisdiction, and the matter might be properly triable at law, yet the defendant, by filing a cross bill, may give the Court jurisdiction. (*f*) And when it is doubtful whether the Court of Equity has jurisdiction, the Court will not try the point on a demurrer. (*g*)

There are also cases of a defendant sued at law, where, although the facts might equally afford a *defence* at law, yet he might file a bill in equity for relief. (*h*) As where a defendant at law has accepted a bill for the accommodation of the plaintiff; (*i*) but where an injunction is prayed against proceedings at law on that ground, the Court of Equity may require the defendant at law to bring the alleged debt into the Court of Equity, until the hearing of the cause, when, if a perpetual injunction be granted, the money will be refunded, with any interest made in the mean time. (*k*)

If the Court of Equity have concurrent jurisdiction, then it would be improper to demur to the bill; and where a bill was filed for relief against an order of the commissioners of sewers, and the defendant demurred on the ground of want of jurisdiction, such demurrer was overruled. (*l*) But an injunction against the act of commissioners of sewers reducing the height of water in a river, was dissolved, there being a much shorter remedy by certiorari in the Court of King's Bench, who interfere with great caution. (*m*).

When the remedy at law or in equity is concurrent, which is preferable.

In some of the cases of jurisdiction alluded to, especially whenever the interest in real or personal property is merely *equitable*, the Court of Equity has either exclusive or concurrent or preferable jurisdiction to that of a Court of Law. In the case of a lost deed, although it was formerly supposed to be otherwise, (*n*) it is now settled that an action at law is

(*d*) *Ante*, vol. i. 850 to 860; and in case of a lost bill, *payment* may be decreed, *ante*, 404, note (*d*).

(*e*) Same case as in note (*s*), preceding page; and see *infra*, note (*m*) (*n*).

(*f*) 2 Mad. Ch. Pr. 288; *Burgess v. Wheale*, Eden, 190.

(*g*) *O'Brien v. Irwin*, 1 Ridg. L. & S. 361; *Weymouth v. Boyer*, 1 Ves. jun. 416.

(*h*) 7 Ves. 249.

(*i*) ——— *v. Adams*, Young's Eq. Exchequer Reports, 117; *Sparrow v.*

Chisman, 9 Barn. & Cres. 241; *ante*, vol. i. 706, note (*x*); but see considerations essential before applying to a Court of Equity, *id* 709.

(*k*) *Id. ib.* and *ante*, vol. i. 709.

(*l*) *Box v. Allen*, Dick. 49.

(*m*) *Kerrison v. Sparrow*, 19 Ves. 449; *ante*, 434, note (*s*).

(*n*) *Toulmin v. Price*, 5 Ves. 238; 2 Madd. Chan. Pr. 170; 7 Ves. 19; 9 Ves. 466.

CHAP. V.
SECT. VI.

sustainable, the declaration averring the destruction or loss as an excuse for a profert; and in general an action at law is preferable, as most expeditious, (l) But there are exceptions. (m) And if a *negociable* bill or note be lost, no action at law is sustainable, and the remedy must be by bill, after tendering an adequate indemnity; (n) and the defendant may file a bill to restrain the action at law when the instrument was negotiable. (o)

In matters of account, also, as between mortgagor and mortgagee, the former has in some cases a summary remedy at law by express statute; (p) and a principal may sue his agent at law for not accounting, or may proceed in equity. (q) *Partners* in general must proceed against each other in equity, or by action of account, unless there has been an admitted balance in favour of one, (r) or an express covenant to account and pay, (s) and in lieu of a bill in Chancery or the Exchequer, to account for the value of tithe, the tithe owner may, as we have seen in the case of predial tithe, sustain an action of debt for treble the value of the tithe the defendant ought to have set out. (t) When the contest relative to tithe is with many inhabitants, then a bill is preferable to an action; but in case of a single individual refusing to set out tithe, an action at law may be preferable, but still depending on other facts. When the debt for tithe is under £20, a suit in the Ecclesiastical Court for subtraction of tithe may be preferable, because the defendant cannot be discharged from imprisonment without payment. (u) When fraud can be proved at law, it is equally available there as a *defence* against a deed or contract as in equity; (x) but if the fraud cannot be established without the assistance of a bill for a discovery and the defendant's answer, then a bill should be filed; and although in general a person is not bound to answer a bill subjecting him to a penalty, it is otherwise by express enactment in some cases, as in gaming (y) and stock-jobbing transactions, (z) when the party is obliged to answer a bill of the party aggrieved, though not that of an

(l) *Read v. Brookman*, 3 T. R. 151; 2 Madd. Chan. Pr. 170.

(m) *East India Company v. Boddam*, 9 Ves. 464; *East India Company v. Donald*, *id.* 275.

(n) *Hazard v. Robinson*, 7 B. & C. 90.

(o) *Devies v. Dodd*, 4 Price, 176, when not, *Mossop v. Eaden*, 16 Ves. 430.

(p) *Ante*, 331.

(q) 5 Taunt. 431; 1 Marsh. 115; 2 Camp. 238; Eq. Cas. Ab. 5; 7 Ves.

588; 2 Young & J. 33.

(r) 2 T. R. 478; 2 Bing. 170; 3 Bing. 55; 6 B. & C. 368; 1 Stark. 78; *ante*, vol. i. 869, 870.

(s) 13 East, 8; 2 T. R. 538, 482.

(t) *Ante*, vol. i. 218 to 221, 398.

(u) *Ex parte Kaye*, 1 B. & Adol. 652.

(x) Per Ashurst, J. in *Cockshott v. Bennett*, 2 T. R. 763.

(y) 9 Anne, c. 14, s. 3.

(z) 7 G. 2, c. 8, s. 2.

informer. (a) There is also in general no remedy at law for a *legacy*, but a suit must be commenced either in a Spiritual Court or in equity. In general, when the legacy is of considerable value, it is preferable to proceed in the latter Court, because there the fund may be secured in Court; (b) but when the legacy is small, it may be readily recovered in the Ecclesiastical Court. (c)

Another rule is, that when the claim is *so small* as not to justify in prudence the expenses of proceeding in a Court of Equity, it will not, in mercy to the claimant, interfere or permit a suit, or otherwise afford relief, the matter being *infra dignitatem*, to which rule, however, we have seen there are some exceptions. (d) A bill of interpleader, where the sum in dispute is under £10, cannot be sustained. (e) Certainly for a small legacy or claim much under £100, it is not worth while to file a bill in Chancery, unless where it is certain that there is an adequate fund, and the costs of the suit will be decreed to be paid out of such fund. In the case of a small legacy, we shall find that the best remedy is in the Court of Arches. (f) It would be well if the legislature would constitute some adequate Court for the recovery of small equitable claims, and perhaps a measure similar to that forming part of the proposed Local Court bill would be salutary.

Not when the claim is so small as to be *infra dignitatem* to afford relief.

It must have been observed, that the usual arrangement of the subjects of the jurisdiction of the Chancellor and his Court of Chancery, is by no means analytical or clear, and unquestionably the particulars of such jurisdiction would have been better arranged under two principal heads, as *first*, in favour of creditors and claimants who seek to *establish* some claim; and *secondly*, on behalf of parties who seek to *resist* some present or future claim.

Summary of the equitable jurisdiction of Court of Chancery.

On the part of the *former* are all those bills and proceedings which seek immediately to litigate and establish a claim, or to prevent it from being incumbered hereafter with difficulty. Of this description are all bills by a cestui que trust against his trustee, where the claimant having only an *equitable* right or interest, he could not in his own name sue at law; as where a bond or other contract has been executed to A. to pay money to him,

(a) *Thistlewood v. Cracroft*, 1 Marsh. 497; 6 Taunt. 141; M'Clel. R. 185; *Billing v. Pulley*, 2 Marsh. 125; *Rawlings v. Hall*, 1 C. & P. 11, 325.

(b) *Sharples v. Sharples*, M'Clel. R. 506; *ante*, vol. i. 551, 716.

(c) *Post*, 467, and n. *Ecclesiastical Courts*.

(d) See the rule and exceptions, *ante*, vol. i. 823.

(e) *Ante*, 418; *Smith v. Target*, 2 Anst. 530.

(f) *Post*, 467, and n.

CHAP. V.
SECT. VI.

or perform some act in trust for the benefit of B., and when in consequence of A. neglecting to act, B., the cestui que trust, is or may be prejudiced, and in which case, as he could not *at law* sue either his own trustee, or proceed against the third party who contracted to pay or to perform, his only remedy, after formal and proper request to A. to act, and B. to pay or perform, is only by bill in equity, because in general the discretion to act having been vested in A. as a trustee, he is not liable to be sued at law, or even in equity, unless it can be shewn, that under the circumstances A., the trustee, ought to have acted, and enforced the performance by B. The same principle equally applies to trustees of *real* property; and before filing a bill in either case, care should be observed to adopt so clear a line of courteous conduct towards the trustee, as to ensure the approbation of a Court of Equity in favour of the cestui que trust.

There are also cases where, although a complainant may be confident that the legal interest in real property is *primâ facie* vested in him, so as to enable him on his own demise to sustain an action of ejectment, but yet there may be reason to fear that some term for years is outstanding, although satisfied and attending the inheritance, but which if proved on the trial might cause a nonsuit, though as neither the lessor of the plaintiff nor the defendant beneficially claimed against the termor, it would be unjust to bring it forward so as to prevent the trial and decision upon the *substantial right and real merits*; in such a case a bill may be filed and decree obtained, preventing the party in possession from setting up or availing himself of such terms as a ground of nonsuit. (f) Still more, if a complainant apprehended that the party in possession has in his custody title-deeds or documents that might embarrass the trial, he may file a bill stating his own title or claim as heir, and pray a discovery of writings alleged to be in the possession or power of the defendant. (g)

Again, if a party beneficially entitled under a contract discover some defect therein, in consequence of the same not having been prepared or executed according to the real intention of the parties, he may, in order afterwards to enforce his demand at law corresponding with the real intention, file a bill to compel the contracting party to execute a proper deed or security, and this even against a surety; (h) or if he agreed to

(f) 1 Madd. Chan. Pr. 201, 259.
(g) *Ibid.* 200.

(h) *Ante*, vol. i. 710, 711.

give a *sufficient* bill or note, and contrived to deliver one on an insufficient stamp, he might be compelled to execute a perfect and binding security.⁽ⁱ⁾ And in the instance of the loss of a negotiable security, the creditor may, after request and offer of a reasonable indemnity, compel the party to execute a fresh security, or rather to pay when the security is already over-due.^(k) So if the contract were to convey an estate, or perform some other act which might still be specifically performed, and where the breach of contract cannot be so well compensated by the payment of damages, then, subject to a certain judicious exception, the claimant may file a bill in equity, and compel the actual performance of the act stipulated to be done, and which being usually the sale or purchase of some *real* property, would occasion permanent and continuing loss, unless performed in its very terms. To these may be added all bills to *prevent* loss, waste or injury, to which we have already referred.

On behalf of a *defendant* or person, on whom a claim is made, and who insists he has *equitable* ground for resisting it, are the various cases of *accident*, *mistake*, or *fraud* stated in a bill, and insisted upon as a ground either for obtaining an *injunction against negotiating*, or a *decree for delivering up the security* obtained by unjust or illegal means. So a person himself claiming no interest, or at most a lien which must at all events be satisfied, may, if there be several claimants of the same chattels, money or debt, file a bill of *interpleader*. Bills of injunctions to *restrain proceedings at law* are exceedingly frequent, and operate not as a *prohibition* to the Court of Law, or Ecclesiastical Court, but merely control the *party* from proceeding therein. In those cases the Court of Chancery does not dispute the *jurisdiction* of the other Court, but proceeds upon the ground that the party suing has made an *improper use of the jurisdiction*, contrary to equity and conscience.^(l)

Bills to ascertain boundaries, to perpetuate testimony, and for discovery, or for a commission to examine witnesses on interrogatories, may be obtained by *either* litigating party.

Anciently the Chancellor exercised all these and other different branches of jurisdiction in person, as he still may do; but towards the end of the last century, and in the present, it was found that the great pressure of business, and the number of

The Chancellor, how relieved from the pressure of some of these several branches of jurisdiction, and the same delegated to other Courts or officers.

(i) *Ante*, vol. i. 710, 711.
(k) *Ante*, 404.

(l) *Hill v. Turner*, 1 Atk. 516, 630;
1 Madd. Ch. Pr. 130.

CHAP. V.
SECT. VI.

appeals, as well in his own Court as at the House of Lords, rendered it difficult, if not impracticable for him to attend to all, at least without occasioning great delay; and therefore the Court and jurisdiction of the Vice-Chancellor was created by the 53 Geo. 3, c. 24. And the equity jurisdiction of the Court of Exchequer was with the same object enlarged by the 57 G. 3, c. 18, and 3 & 4 W. 4, c. 41, ss. 25 and 27; and the Bankruptcy Court and Court of Review were established by 1 & 2 W. 4, c. 56, for the very purpose of relieving the Chancellor from the direct pressure of bankruptcy petitions; and the 3 & 4 W. 4, c. 94, sect. 24, authorizes and requires every *future* Master of the Rolls (or the present if he think fit) to give directions for that purpose, to hear motions, pleas, and demurrers in his Court, as hereafter are more fully stated, being an extension of his previous practice. And the 13th section of the same statute relieves the Court of Chancery of a burthensome part of its more ordinary business, by enacting that the Masters in ordinary of the Court of Chancery shall hear and determine all applications for time to plead, answer, or demur, and for leave to amend bills, and for enlarging publications and all such other matters relating to the conduct of suits in the said Court, as the Lord Chancellor, with the advice and assistance of the Master of the Rolls and the Vice-Chancellor, or one of them, shall by any general order or orders direct; but enables either party to appeal by motion from the order made on such application to the Lord Chancellor, Master of the Rolls, or Vice-Chancellor.(m)

By these several modern enactments, the Chancellor has been greatly relieved from some of the burthens of his office, and enabled better to attend the more important branches of his jurisdiction, and now it is seldom that the Chancellor hears *original* causes.

In order that the business of the Court may not be interrupted by the absence of the Lord Chancellor from illness or other cause, there is a commission addressed to the puisne judges and the then masters, authorizing any three of them, of whom a judge is to be one, to transact the business of the Court. When the business of the Court is despatched under the authority of this commission, it is transacted by one judge and two masters, who sit with the judge, join in making the orders, and constitute a necessary part of the Court. Be-

(m) It will be observed that this enactment is somewhat analogous to that in 1 W. 4, c. 70, sect. 1, enabling one of the

five judges of the Courts of law to set apart and decide upon certain inferior descriptions of business.

sides this provision, which only applies in case of the absence of the Chancellor, he is entitled to call to his assistance on the bench any of the judges, as he shall think proper, (n) and which jurisdiction the Chancellor frequently exercises, as on appeals from the Master of the Rolls or the Vice-Chancellor, especially when any difficulty is apprehended. (o)

In general, the above observations respecting the equity jurisdiction of the Court of Chancery, equally apply to the equity side of the Exchequer and all other Courts of Equity. And whatever difference there may be in the forms of practice, the same has arisen from the different constitution of their offices, so much so, that it has been observed, that if they differ in any thing more essential, one of them must certainly be wrong, because truth and justice are always uniform, and ought equally to be adopted by them all. (p)

The jurisdiction and proceedings in all Courts of Equity in general the same.

It will be remembered that we are now only examining the *jurisdiction* of the Court of Chancery. The *practice*, modified and improved by the several acts, 1 W. 4, c. 36, & c. 60, 2 & 3 W. 4, c. 50, and 3 & 4 W. 4, c. 84, & c. 94, will be fully considered after examining that of the Superior Courts of Law. From decrees and decisions in the Court of Chancery, an appeal lies direct to the House of Lords. (q)

SECT. VII.—Of the Master of the Rolls.

In relief of a part of the burthensome jurisdiction of the Chancellor, *the Master of the Rolls* has his Court called "*The Rolls*," in which he exercises a very ancient and important jurisdiction, but the actual extent of which, in the early part of the last century, gave rise to much discussion; and several controversial works were published on the occasion. (s) Mr. Maddocks, in his *Chancery Practice*, observes, that the better opinion is, that the Master of the Rolls had *no original jurisdiction* respecting matters arising in the *common law* side

SECT. VII.
The Master of the Rolls, and his Court and jurisdiction. (r)

(n) See 1 Newl. Chanc. Prac. 3.

(o) Recently, i. e. 26th June, 1834, in *Attorney-General v. Shore*, in Court of Chancery, on an appeal from the Vice-Chancellor's decision, the Lord Chancellor was assisted by Mr. Baron James Parke and Mr. Justice Littledale.

(p) 3 Bla. Com. 429.

(q) Com. Dig. Parliament, L. 7.

(r) Com. Dig. Chancery, B. 4, and *id.* Appendix; Vin. Ab. tit. Master of the Rolls; Sir Joseph Jekyl's *Treatise on the Office of the Master of the Rolls*, and other works referred to, *infra*.

(s) See "A Discourse of the Judicial Authority belonging to the Master of the Rolls in the High Court of Chancery,

2d edit. A. D. 1728," supposed to have been composed by Mr. York, afterwards Lord Hardwicke, 1 Madd. Ch. Pr. 21. And see "The Legal Court of Judicature in Chancery." The author of the first work contends, in 2d edit. page 9, that the Master of the Rolls always had jurisdiction on the common law side of the Court of Chancery, by virtue of his office, and that he exercised judicial authority on the equity side, independently of any special commission. The student, who intends to practise in equity, would do well to peruse those two works, which contain much information and probably occasioned the stat. 3 G. 2, c. 30.

CHAP. V.
SECT. VII.

of the Court of Chancery. (t) Cardinal Wolsey, it is said, first introduced the practice and jurisdiction of the Master of the Rolls in hearing and determining causes in the absence of the Chancellor. (u) It was afterwards contended that the Master of the Rolls had no judicial authority *virtute officii*, but only by virtue of a special and expressly delegated particular power. (u)

The jurisdiction
of the Master of
the Rolls
settled by
3 G. 2, c. 30.

The statute 3 G. 2, c. 30, appears to have been expressly enacted to remove all doubt, and in a degree to fix the limits and qualify this jurisdiction. The act is entituled, "An Act to put an end to certain Disputes touching Orders and Decrees made in the Court of Chancery." And after reciting that "Whereas divers questions and disputes having arisen touching the authority of the Master of the Rolls in the High Court of Chancery, for putting an end to all disputes concerning the same," enacts, "That *all orders and decrees, made by the Master of the Rolls (except orders and decrees of such nature as, according to the course of the Court, ought only to be made by the Lord Chancellor, Lord Keeper, or Lords Commissioners,) shall be deemed valid orders and decrees of the Court of Chancery, subject nevertheless to be altered by the Lord Chancellor, &c. and so as no such orders or decrees be enrolled till the same are signed by the Lord Chancellor,*" &c. The Master of the Rolls has therefore precisely the same original jurisdiction as the Chancellor, *except in cases where, by the antecedent course of practice, the Lord Chancellor himself must have personally acted.* And the statute also renders it essential that the *Chancellor should sign* the orders and decrees of the Master of the Rolls to give them complete efficacy.

The Court and
jurisdiction of
the Master of
the Rolls. (x)

The time and place of the Master of the Rolls holding his Court was formerly at six o'clock in the evening, at his own house in the Rolls Yard. But the present Master of the Rolls altered those hours of sitting, and now sits *in the morning* as the other judges do; in *term time* at Westminster, and in *vacation* at the Rolls, and usually from eleven till four in the afternoon. All decrees made by him must be signed by the Lord Chancellor before they are enrolled. (y) He takes an oath prescribed by 18 Edw. 2, and holds his office for life with a salary now of 7,000*l.* a year. (z) He takes precedence next to the Chancellor and before the Vice-Chancellor (a) and all

(t) 1 Madd. Ch. Pr. 21, 22; and see *Lloyd v. Scott*, 2 Dick. 576.

(u) Wyntt's Prac. Reg. 278; Com. Dig. Chancery, B. 4; Vin. Ab. tit. Master of the Rolls.

(x) See in general Com Dig. Chancery, B. 4; Vin. Ab. tit. Master of the

Rolls; Sir Joseph Jekyl's Treatise on the Office of the Master of the Rolls, and the treatises referred to, *ante*, 443, note (s).

(y) 3 G. 2, c. 30, s. 1.

(z) 23 G. 2, c. 25, s. 6; 6 G. 4, c. 84.

(a) 53 G. 3, c. 24.

other of the judges. The Master of the Rolls has jurisdiction to direct the issuing of a writ *ne exeat regno*. (b) He may state and send a case for the opinion of the judges of a Court of law, as to either the King's Bench or Common Pleas, (c) though formerly it was supposed that he could only do so when sitting for the Chancellor; (d) but in neither case can questions be asked upon facts stated, as a trust, or a mere question of equitable jurisdiction; and if a case should be so defectively stated, the judges may decline answering the same. (e)

The Master of the Rolls may discharge an order made by the Chancellor *ex parte*, or on a motion of course. (f) From his decree in the capacity of Master of the Rolls, there lies an appeal to the Chancellor in his Court. (g) But an appeal does not lie from the Rolls to the House of Lords, until the decree has been signed and enrolled; (h) and indeed the 3 G. 2, c. 30, appears imperatively to require such signature before enrollment of the Master's decree.

Under the excepting words of the 3 G. 2, c. 30, the Master of the Rolls had no jurisdiction in lunacy or bankruptcy, (i) and subpcenas returnable immediately were also within the exception. (k) But the recent bankrupt act, 1 & 2 W. 4, c. 56, s. 12, expressly authorizes the Master of the Rolls to issue *his fiat* against a bankrupt, though the third section of the act appears impliedly to take away all other jurisdiction.

Before the passing of the 3 & 4 W. 4, c. 94, s. 24, it was not the practice of the Master of the Rolls to hear motions, pleas, or demurrers in his Court, and whatever was presented for his decision, other than the hearing of causes, was brought before him by petition; but that act requires that any *future* Master of the Rolls shall hear and determine all motions arising in causes depending in the High Court of Chancery, as shall be duly made before him, according to the usage and practice of making motions in causes before the Chancellor, and to hear and determine all such pleas and demurrers filed in causes depending in Chancery as shall be duly set down for hearing before him; and that all orders made by the said Master upon the hearing such motions, pleas and demurrers, shall be deemed and taken to be valid orders of the Court of Chancery; sub-

(b) *Boehm v. Wood*, 1 Turner & R. 343; *ante*, vol. i. 732.

(c) *Daintry v. Daintry*, 6 T. R. 313; *ante*, 351.

(d) 2 Bro. Ch. Cas. 88; Com. Dig. Chancery, B. 4, note (x), 5 edit.

(e) 5 Ves. 578, *ante*, 351, 352.

(f) *Davy v. Seys*, Mos. 71.

(g) Com. Dig. Chancery, B. 4, note

(x), 5th ed.; and see 3 G. 2, c. 30.

(h) *Cunyngham v. Cunyngham*, Ambl. 91; Dick. 145, S. C.

(i) 1 Newland Pr. Ch. 2d ed. 3, 4; Com. Dig. Chancery, B. 4, note (x), 5th edit.

(k) Ord. Ch. 37; Com. Dig. Chancery, B. 4, 5th edit.

CHAP. V.
SECT. VII.

ject nevertheless in every case to be discharged, reversed, or altered by the Chancellor. And then section 25 provides "that the *present* Master of the Rolls need not hear or determine any such motions, pleas, or demurrers unless he shall think fit to give directions for that purpose." But it is said to be the opinion that his honor the Master of the Rolls has no jurisdiction respecting matters arising on the *common law* side of the Court of Chancery; (*l*) and lunacy we have seen is virtually excepted by 3 G. 2, c. 30.

The office of the Master of the Rolls, unlike that of Vice-Chancellor, partakes in its nature of a *distinct* jurisdiction, and every plaintiff in equity *may elect* whether he will have his cause set down and heard and decided by the Master of the Rolls or the Vice-Chancellor. (*m*) The jurisdiction of the Master of the Rolls is so far independent that it is not competent to the Lord Chancellor to order him to review a report confirmed and followed by a decree of the Master of the Rolls, containing consequential directions, while that decree stands. (*n*) But exceptions to a Master's reports under a decree at the Rolls may be set down before the Lord Chancellor. (*o*) It has been supposed that the Master of the Rolls does not grant injunctions; the practice, however, is otherwise.

SECT. VIII.—*Of the Vice-Chancellor.*SECT. VIII.
THE VICE-
CHANCELLOR.
Of the Vice-
Chancellor and
his Court and
jurisdiction.

The jurisdiction of the Vice-Chancellor was created by 53 G. 3, c. 24, entitled "An Act to facilitate the Administration of Justice," and whereby, after reciting that the number of appeals and writs of error in parliament had of late greatly increased, and that it had become necessary that a larger proportion of time should be allotted for hearing and determining such appeals and writs of error than has usually been employed for that purpose, and therefore, as well as for the better administration of justice in the several judicial functions belonging to the offices of the Lord High Chancellor, Lord Keeper or Lords Commissioners for the custody of the great seal of the United Kingdom, it is *expedient that another judge should be appointed to assist in the discharge of such judicial functions*; it therefore enacts, that it shall and may be lawful for his Majesty, his heirs and successors, to nominate and appoint from time to time, by letters patent under the great seal of the United Kingdom, a fit person, being a barrister-at-law of fifteen years

(*l*) Madd. Ch. Pr. 20, 22; Com. Dig. Chancery, B. 4, note (*x*), 5th ed.
(*m*) Smith's Ch. Pr. 4.

(*n*) *Turner v. Turner*, 1 Swanst. 154.
(*o*) *Burdon v. Burdon*, 9 Ves. 499.

standing at the least, to be *an additional judge assistant* to the Lord High Chancellor, Lord Keeper or Lords Commissioners for the custody of the great seal of the United Kingdom for the time being, in the discharge of the judicial functions of their respective offices, and to be called *Vice-Chancellor* of England, to hold such office during his good behaviour.

2. And that such Vice-Chancellor shall have full power to hear and determine *all causes, matters, and things* which shall be at any time *depending in the Court of Chancery* of England, *either as a Court of Law or as a Court of Equity, or incident to any ministerial office of the said Court, or which have been or shall be submitted to the jurisdiction of the said Court, or of the Lord Chancellor, Lord Keeper or Lords Commissioners for the custody of the great seal for the time being, by the special authority of any act of parliament, (p) as the Lord Chancellor, Lord Keeper or Lords Commissioners for the custody of the great seal shall from time to time direct; and all decrees, orders, and acts of such Vice-Chancellor, so made or done, shall be deemed and taken to be respectively, as the nature of the case shall require, decrees, orders, and acts of the said Court of Chancery, or of such incident jurisdiction as aforesaid, or under such special authority as aforesaid, and shall have force and validity and be executed accordingly; subject nevertheless, in every case, to be reversed, discharged, or altered by the Lord Chancellor, Lord Keeper or Lords Commissioners for the custody of the great seal for the time being; and no such decree or order shall be enrolled until the same shall be signed by the Lord Chancellor, Lord Keeper or Lords Commissioners of the great seal for the time being: Provided always* that such Vice-Chancellor shall have no power or authority to discharge, reverse, or alter any decree, order, act, matter, or thing made or done by any Lord Chancellor, Lord Keeper or Lords Commissioners for the custody of the great seal unless authorized by the Lord Chancellor, Lord Keeper or Lords Commissioners for the time being so to do, nor any power or authority to discharge, reverse, or alter any

(p) The terms of this enactment coupled with the object of the legislature, relieve the Chancellor in his burthensome office in a very extensive degree, and accordingly, in the Vice-Chancellor's Court, on Thursday, 7th August, 1834, the Vice-Chancellor said that he had consulted with his lordship on a point which had arisen incidentally, as to his (the Vice-Chancellor's) jurisdiction in cases of *lunacy*, where in fact a party was a lunatic though not found so by an inquisition; and

that after considering the act of parliament on this subject, his lordship was of opinion that the Vice-Chancellor might make a preliminary order to the Master to report in such cases, because such an order would not be taking the estate out of the party's hands. The final order would be, of course, reserved to the Lord Chancellor. And see the lucid observations of the Vice-Chancellor and Lord Brougham on this act, in *Ex parte Benson*, 1 Deac. & Chit. Rep. 326 to 340.

CHAP. V.
SECT. VIII.

decree, order, act, matter, or thing made or done by the Master of the Rolls. 3. Enacts that such Vice-Chancellor shall sit for the Lord Chancellor, Lord Keeper or Lords Commissioners for the custody of the great seal whenever they shall respectively *require* him so to do, and shall also at such other times as the Lord Chancellor, Lord Keeper or Lords Commissioners of the great seal shall direct, sit in a *separate Court*, whether the Lord Chancellor, Lord Keeper or Lords Commissioners of the great seal, or the Master of the Rolls shall be sitting or not; for which purpose the said Lord Chancellor, Lord Keeper or Lords Commissioners of the great seal respectively, shall make such orders as to them respectively shall appear to be proper and convenient from time to time as occasion shall require. 4. Enacts that such Vice-Chancellor shall have rank and precedence next to the Master of the Rolls.

The 5th section relates to the secretary and other officers of the Vice-Chancellor. The 6th section provides for the removal of the Vice-Chancellor upon an address of both Houses of Parliament, consequently the Vice-Chancellor is not so independent as the judges. The 7th section prescribes the form of the Vice-Chancellor's oath. The 8th section directs the funds out of which the 5000*l.* a year salary of the Vice-Chancellor (afterwards increased to 6000*l.*) and his officers shall be paid. The 9th, 10th, and 11th sections authorize the change of the fund. The subsequent sections have minor objects, and the 13th section prohibits the taking any fee or reward beyond the fixed salaries.

It will be observed that this act enacts that the Vice-Chancellor's decree shall be valid, and that he may sit in the absence of the Lord Chancellor or in a separate Court *at the same time* as the Chancellor is sitting, and the statute then declares his rank to be after the Master of the Rolls. The act directs that his decrees shall be subject to reversal by the Chancellor, and must be signed by the latter before they are enrolled. Consequently, where a cognovit was given, with a condition that if the *ultimate decision* of certain chancery suits should be for the plaintiff the defendant should pay 500*l.* within a month after *such* decision, or that execution should issue, it was held that the decree of the Vice-Chancellor, which had not been passed by the registrar, and against which a caveat had been entered with intent to appeal to the Lord Chancellor, was not such an *ultimate* decision as to authorize an execution. (*q*)

The duties of the Vice-Chancellor are to hear and determine all causes, matters, and things which shall be at any time

(*q*) *Dummer v. Pitcher*, 3 B. & Adol. 347.

depending in the Court of Chancery of England, either as a Court of Law or as a Court of Equity, or incident to any ministerial office of the said Court, or which have been or shall be submitted to the jurisdiction of the said Court, or of the Lord Chancellor, Lord Keeper or Lords Commissioners for the custody of the great seal for the time being, by the special authority of any act of parliament, as the Lord Chancellor, Lord Keeper or Lords Commissioners for the custody of the great seal shall from time to time direct. By section 3 the Vice-Chancellor is to sit for the Lord Chancellor in his absence, or in a separate Court at the same time that the Lord Chancellor is sitting. (r) We have seen that the Chancellor may, under the statute, delegate any branch of his jurisdiction to the Vice-Chancellor, as in matters of lunacy; (s) and the Vice-Chancellor may in vacation, though not in term time, issue a prohibition to an Ecclesiastical or other Court when attempting to exceed its jurisdiction. (t)

The Lord Chancellor may direct the Vice-Chancellor to hear a petition for a writ of procedendo to issue where a commission has been superseded on the Vice-Chancellor's order confirmed by the Lord Chancellor. (u)

The Vice-Chancellor has no jurisdiction under this act, and certainly not otherwise, to alter, vary or discharge an order made by the Master of the Rolls. (x) Under the former bankrupt acts he had jurisdiction to supersede a commission of bankruptcy, (y) and he might certify the propriety of a procedendo upon a supersedeas on his certificate, (z) and the Chancellor might have directed a procedendo upon a commission superseded by the Vice-Chancellor's order confirmed by the Chancellor. (a) But since the recent bankrupt act, 1 & 2 W. 4, c. 56, although by section 12 he may issue his fiat so as to initiate proceedings in bankruptcy, yet all further jurisdiction is taken away from him by implication, as the act provides that appeals from the Court of Review shall be heard *only* by the Chancellor himself. (b) Supposing that *by consent* the Vice-Chancellor might hear a motion to *discharge* or alter an order made by the Lord Chancellor, yet he is not authorized to *alter* it. (c)

(r) Sect. 8 gave a salary of 5000*l.* per annum, but which was increased to 6000*l.* per annum by 6 G. 4, c. 84.

(s) *Ante*, 447, note (p).

(t) *Donegal v. Donegal*, 3 Phil. 597; but not in term time, Com. Dig. Chancery, Appendix, tit. Prohibition.

(u) *Ex parte Hurd*, Buck, 45.

(x) *Whitehouse v. Hickman*, 1 Sim. & Stu. 104; 53 G. 3, c. 24, s. 2, *ante*, 447.

(y) 2 Rose, 162, 235, note; Com. Dig.

Chancery, B. 1, note (s), 5th edit.

(z) 1 Buck, 3.

(a) 1 Buck, 45; Com. Dig. Chancery, B. 1, note (s).

(b) Eden's (now Ld. Henley) Bankrupt Law, 3d ed. 475; and see Stewart's Prac. Bank. 94, 96; *Ex parte Lowe*, 1 Dea. & Chit. 30; but see *Ex parte Benson*, *id.* 324.

(c) *Saunders v. King*, 2 Jac. & W. 429.

CHAP. V.
SECT. VIII.

Notices of motions intended to be made before the Vice-Chancellor must express the same, unless by consent of the parties to the contrary or by the Chancellor's order. And motions upon such notices can be made only before the Lord Chancellor unless he shall otherwise direct. (c)

The suitors attending the Vice-Chancellor's Court have the same privileges as that of suitors of the other Superior Courts, and we have seen that where a person was taken in execution upon a *capias ad satisfaciendum* within the outer door of the Vice-Chancellor's Court of Lincoln's Inn, while the Court was sitting, the Lord Chancellor ordered the officer to attend with his prisoner forthwith, and examined the officer, and discharged the prisoner immediately. (d)

SECT. IX.—*Of the Equity Side of the Exchequer.*SECT. IX.
EQUITY SIDE
OF EXCHEQUER.
The Equity side
of the Court of
Exchequer. (e)

The Exchequer, we have seen, was originally in all its branches a mere *Revenue Court*. But in progress of time, and by the fiction that the claimant was a debtor to the King, and that by the injury complained of he was rendered *less able* to satisfy the pretended debt to the King, it assumed jurisdiction over *equitable* matters, as we have seen it did over *legal* matters. And the Court of Chancery has also, in consequence of the superabundance of business there, instead of evincing any jealousy against this Court, actually sent equitable jurisdiction to it. (f) The Exchequer consists of two divisions, viz. the receipt of the Exchequer and the Court or judicial part of it, which is again subdivided into a Court of Equity and a Court of Common Law. The Court of Equity is holden in the Exchequer Chamber, and supposed to be so holden before the Lord Treasurer, the Chancellor of the Exchequer, the Chief Baron and three puisne Barons. But the 57 G. 3, c. 18, reciting the necessity for authorizing the Chief Baron *to sit alone in Equity*, empowers the *Lord Chief Baron* to hear and determine *alone* all causes, matters and things in the Court of Exchequer *as a Court of Equity*; and if he should, by sickness or other unavoidable cause, be prevented from sitting for those purposes, the King may, from time to time, appoint by warrant under his sign-manual, any other of the barons to hear and determine the same. (g) And the 3 & 4 W. 4, c. 41, ss. 25 &

(c) Orders in Chancery, 13th Dec. 1814, 2 Ves. & B. 419.

(d) *Orchard's Case*, 5 Russ. R. 159; *ante*, vol. i. 695.

(e) 3 Bla. Com. 45; Com. Dig. Courts, D. 7; Chit. Eq. Dig. tit. Courts, I.

(f) *Newbery v. Wren*, 1 Vern. 221.

(g) 57 G. 3, c. 18, intituled, "An Act to facilitate the hearing and determining of Suits in Equity in his Majesty's Court of Exchequer at Westminster," passed 29th

27, has, with a view to increase the ability of despatching equity proceedings in this Court, extended the power of appointing a Baron to sit in equity in lieu of the Chief Baron, when the latter is sitting at Nisi Prius or at the judicial committee of the Privy Council; and it seems to be considered that under the first statute the Chief Baron sitting alone has authority even to set aside a decree made by the whole Court. (*h*) Since this statute 57 G. 3, c. 18, the Court of Exchequer is, for certain purposes, considered *always open* all the year round as a Court of Equity. (*i*)

Anciently equity suits could only be instituted in this Court in *revenue matters*, and when the party was a debtor to the crown, or was a clergyman bound to pay to the king his first fruits and annual tenths. The latter circumstance occasioned the clergy in general to file their bills relative to tithes in this Court; (*k*) and this probably gave rise to the practice more frequently to institute *tithe suits* in this Court, which had become more conversant with the subject than the Court of Chancery. By the like fiction that the law side of the Exchequer assumed jurisdiction over all personal actions, other persons, also feigning themselves to be debtors to the king, instituted their suits in the equity side of this Court; and a bill may be filed in the equity side of the Court of Exchequer for a legacy, or against

March, 1817. "Whereas the proceedings on the common law side of the Court of Exchequer have of late years greatly increased, by reason whereof a sufficient proportion of time cannot be allotted for hearing and determining suits in equity in the said Court; and whereas the business of that Court might be more easily despatched, if the Lord Chief Baron or one other of the Barons of the degree of the coif were duly authorized to hear and determine suits and proceedings on the equity side thereof, as is hereinafter enacted; be it therefore enacted, &c. that from and after the passing of this act, the Lord Chief Baron of the said Court for the time being shall have power to hear and determine all causes, matters and things which shall be at any time depending in the said Court of Exchequer, as a Court of Equity; and that if the said Lord Chief Baron shall by sickness or other unavoidable cause, be prevented from sitting for the purposes aforesaid, then it shall and may be lawful for his Majesty and his successors to nominate and appoint, from time to time, by warrant under the royal sign manual, revocable at pleasure, any one other of the barons of the degree of the coif of the said Court for the time being, to hear and determine such causes, matters and things.

Sect. 2 enacts, "That the said Lord Chief Baron, or the Baron so to be appointed, shall sit at such times as the Lord Chief Baron and such Baron shall respectively, with regard to matters to be heard before them respectively, appoint, and whether the rest of the said Barons of the said Court shall be sitting or not; and that all decrees, orders and acts of the said Lord Chief Baron, or of such Baron so appointed as aforesaid, shall be deemed and taken to be respectively, as the nature of the case shall require, decrees, orders and acts of the said Court of Exchequer, and shall have force and validity, and be executed accordingly, subject only to be reversed, discharged or altered by the House of Lords, upon appeal thereto and as hereinafter mentioned.

Sect. 3. Provided that it shall and may be lawful for the said Lord Chief Baron, upon petition by any of the parties concerned, to re-hear any cause or matter before decided, ordered, adjudged or decreed by such Lord Chief Baron or by any other Baron appointed as aforesaid; and also for any Baron appointed as aforesaid, upon petition as aforesaid, to re-hear any cause or matter before decided, ordered, adjudged or decreed by him the same Baron, and respectively thereupon to make such order as may be just."

(*h*) *Jones v. Roberts*, 1 M'Clel. & Y. 567.

(*k*) 3 Bla. C. 46, 47.

(*i*) *Tucker v. Sanger*, 10 Price's R. 132.

CHAP. V.
SECT. IX.

Advantages of
filing a bill for
an injunction in
this Court of
Exchequer in
preference to
Chancery.

Tithes.

an executor, so as to secure the fund. (*l*) An appeal from the equity side of the Court of Exchequer lies immediately to the House of Peers.

When the object of an equity suit is in part to obtain an injunction and *to stay a trial at law*, it may in many cases be preferable to file a bill in the Exchequer than in Chancery, because in the former Court an injunction will even *stay a trial*; (*m*) whereas in the latter an injunction will not stay a trial but only *execution*, unless it were obtained before declaration. (*n*) Another advantage results from instituting an equity suit in this Court, viz., that by the practice of the Court of Exchequer on the equity side, if a question of *mere law* arise in the course of its equitable jurisdiction, the Court will decide upon it without the delay and expense of referring it to another jurisdiction, because the Lord Chief Baron, and the Puisne Baron when sitting for him, is as much a judge of a Court of Law as of Equity, and therefore it is unnecessary to delegate the question of law to another Court. (*p*) We have seen that, although it was originally otherwise, yet it has been long established that the Court of Chancery has jurisdiction in *tithe* causes, and they are frequent in that Court, and that as the decree continues the liability to account down to the time when the *decree* is pronounced, the Court of Chancery is in that respect the preferable Court. (*q*) But this equity side of the Court of Exchequer is the *original* and proper jurisdiction for tithes, that Court having for centuries taken consueance of them, probably on account of the right of the crown to the first fruits. (*r*) There is, as observed by Mr. Maddox, some difference in these tithe cases as to the proceedings in the Court of Chancery and the Exchequer. In the Exchequer, an account of tithes is decreed not prospectively, but only up to the time of filing the bill: but in the Court of Chancery the decree is for an account up to *the time of the decree*, (*s*) or, as Lord Hardwick says in another case, "down even to the time of the Master's report;" (*t*) or as Baron Clarke says in a third case, "an account for tithes may be carried on as long as the suit is depending between the parties." (*u*) It is observable also that though the

(*l*) *Duncumbent v. Stint*, 1 Chan. Cas. 121; Chit. Eq. Dig. Legacies, 640; *Sharples v. Sharples*, M'Clel. Rep. 506.

(*m*) *Earnshaw v. Thornhill*, 18 Ves. 488; *Nelthorpe v. Law*, 13 Ves. 324; 2 Mad. Ch. Pr. 220; Chit. Eq. Dig. tit. Practice, Injunction, 1038, 1039.

(*n*) *Id.* and 1 Mad. Ch. Pr. 133; *Garlick v. Pearson*, 10 Ves. 452; 3 Woodes. Vin. L. 411.

(*p*) 2 Mad. Ch. Pr. 474.

(*q*) *Ante*, 410, 420; 1 Mad. Ch. Pr. 104 to 106.

(*r*) *Ante*, 451; and 1 Mad. Ch. Pr. 105.

(*s*) 2 Atk. 136; 2 P. Wms. 463; *Carellon v. Brightwell*.

(*t*) 2 Atk. 137.

(*u*) *Bell v. Read*, 3 Atk. 590.

demand for tithes be ever so small and inconsiderable, yet still a bill in equity may be filed for the recovery of them, on account of the permanently accruing profit. (x) When the title to tithes has been clearly made out, the Court of Chancery or Exchequer decrees an account: and where a modus or real composition is pleaded and supported by reasonable evidence, it is the practice to direct an issue at law, before they decree against the common law right of the parson. The issue from the Court of Chancery is tried in the King's Bench or Common Pleas: but an issue from the Exchequer is tried on the law side of that Court. (y)

The Court of Exchequer may grant orders in nature of the writ of *ne exeat regno*, applying them only to cases to which the Court of Chancery would confine the writ. (z) But in general the application for that writ should be to the Chancellor or Master of the Rolls.

In *parochial matters* it is sometimes expedient to resort to the equity side of the Court of Exchequer; thus on petition by inhabitant householders under the 52 G. 3, c. 101, on account of misapplication of funds of a parochial charity by trustees, where the application does not extend to regulate or alter the charity, or to carry it into execution, the Court of Exchequer has jurisdiction, especially when the charity was established by royal charter. (a) So the Exchequer has jurisdiction as a Court of Equity in matters of public accounts between government and the persons employed. (b)

In some respects the Court of Exchequer has equitable jurisdiction, which the Court of Chancery has not. Thus no information can be brought in Chancery for such mistaken charities as are given to the king by the statutes for suppressing superstitious uses; nor can Chancery give any relief against the king, or direct any act to be done by him, or make any decree disposing of or affecting his property; not even in cases where he is merely a trustee. (c) Such causes must be determined in the Court of Exchequer as a Court of Revenue; which alone has power over the king's treasure, and the officers employed in its

The Equity side of the Exchequer has exclusive equitable jurisdiction in cases relative to crown property and superstitious uses.

(x) 4 Bro. P. C. 314; Gwillim, 736.

(y) *Lygon v. Strutt*, 2 Anstr. 601; *Baker v. Athill*, 2 Anstr. 493; 1 Mad. Ch. Pr. 105, 106.

(z) 11 Ves. 46.

(a) *In re Chertsey Market*, 6 Price's R. 261.

(b) *Attorney-General v. Lindegreen*, 6

Price's R. 287; see further, 1 Chit. Eq. Dig. 253.

(c) 3 Bla. Com. 428; *Huggins v. York Buildings' Company*, Chanc. 24 Oct. 1740; *Reeve v. Attorney-General*, Chanc. 27 Nov. 1761; *Lighboun v. Attorney-General*, Chanc. 2 May, 1743.

CHAP. V.
SECT. IX.

management; unless where it properly belongs to the Duchy Court of Lancaster, which hath also a similar jurisdiction as a Court of Revenue, and like the other consists of both a Court of Law and a Court of Equity. (d)

SECT. X.—*The Jurisdiction and General Practice of the Ecclesiastical Courts.*

General Observations.

Section I.—*Subjects of Ecclesiastical Jurisdiction.*

First, When these Courts have Jurisdiction.

I. Over Private Injuries.

Jurisdiction is local as to Person.

1. Causes Pecuniary.
2. Matrimonial Causes.
 1. Jactitation of Marriage.
 2. Nullity of Marriage.
 3. Restitution of Conjugal Rights.
 4. Divorces.
 1. For Cruelty.
 2. For Adultery.
3. Testamentary Causes.
 - Legacies.
4. Defamation.
5. Perturbation of Pews.

II. Over Public Matters and Offences.

1. Church Rates.
2. Schools.
3. Ecclesiastical Officers.
 1. Churchwarden.
 2. Ministers, &c.

4. Offences Spiritual, as Ecclesiastical Perjury, Simony, Usury, Brawling, Assaulting Clergy, Adultery, Fornication, &c.

5. Limitation of Suits in Ecclesiastical Courts.

6. Circumstances rendering Ecclesiastical Court preferable.

Secondly, When these Courts have not Jurisdiction.

Course of Proceedings in.

Of Right of Intervening.

Section II.—*Of the several Ecclesiastical Courts.*

In general.

1. Archdeacon's Court.
2. Consistory Court.
3. The Court of Peculiars.
4. Arches Court.
5. Prerogative Court.

How to obtain Probate or Letters of Administration, and entering caveats, &c.

How to obtain Assignment of Administration Bond.

6. The Court of Faculties.

SECT. X.
THE ECCLESIASTICAL JURISDICTION AND COURTS.

We have alluded in a former page to the ancient struggles of the different Courts to increase their own or diminish or controul the jurisdiction of other Courts; (e) and “hence,” as observed by Willes, C. J., “so many jarring cases on the head of prohibition, difficult to reconcile; for when the power of the church ran very high, the judges were cautious in granting prohibitions; but when it did not run quite so high, the judges ventured to go further in granting them.” (f) We have, however, seen that happily all feelings of that nature have long ceased. (g) Mr. Justice Blackstone (writing in A.D. 1765) observed, that it must be acknowledged to the honour of the Spiritual Courts that, though they continue to decide many

(d) 3 Bla. Com. 428.

(e) *Ante*, 307.

(f) In *Chesseman v. Hoby*, Willes, 680.

(g) Per Sir J. Nicholl, in *Grignon v. Grignon*, 1 Hagg. Ecc. Rep. 545, *ante*, 307.

questions, which are properly of *temporal* cognizance, yet justice is in general so ably and impartially administered in those tribunals, especially of the superior kind, and the boundaries of their power are so well known and established, that no material inconvenience can arise from that jurisdiction still continuing in the ancient channel; (*h*) and unquestionably when we reflect that since the learned commentator published that observation, such distinguished individuals as Sir William Scott, (afterwards Lord Stowell,) Sir J. Nicholl, Dr. Lushington, &c. have presided in the superior Ecclesiastical Courts, it will be concluded that the spiritual jurisdiction has been still better explained and enforced. It has been usual to consider ecclesiastical or spiritual jurisdiction under two heads; as, *first*, what are or are not *subjects of such jurisdiction* in one or other of the Ecclesiastical Courts, without regard to the particular Court in which it is exercised; and, *secondly*, with reference to the *Ecclesiastical Courts* themselves, and the separate jurisdiction of each, (*i*) and we will also take a practical view of the *proceedings* in these Courts in general, and in several of the most usual suits.

—◆—

First, The Subjects of Ecclesiastical Jurisdiction.

There are numerous injuries and offences as well of a *private* as of a *public* nature which are not remediable or punishable in a Court of Law or Equity, *but only* in one of the *Spiritual or Ecclesiastical* Courts; others where the *latter Courts* and Courts of Equity or Law have *concurrent jurisdiction* with the Ecclesiastical Courts, and yet it may be preferable to proceed in the latter. And first of *private* injuries remediable or punishable in these Courts, (and which are the more immediate objects of consideration in this work.) Those cognizable in the Ecclesiastical Courts have usually been arranged under three general heads, as 1. Causes *pecuniary*; 2. Causes *matrimonial*; (*l*) 3. Causes *testamentary*; (*m*) and to these we will add two others of considerable importance and frequency, viz. 4. *Suits for defamation*; 5. *Suits for perturbation of pews*, or disturbances of seats in a church.

First, Of the subjects of Ecclesiastical jurisdiction in general. (*k*)

First, jurisdiction over private injuries.

(*h*) 3 Bla. Com. 98, 99.

(*i*) See as to the former, 3 Bla. Com. 87 to 103; and as to the latter, *id.* 61 to 68.

(*k*) As to the Ecclesiastical or Spiritual Courts in general, see Oughton Ordo judicorum, translated in part by Law; Clerks

Assistant in Practice Eccles. Court; Consett on Courts; Burn's Eccle. Law, tit. Courts; Com. Dig. Courts, N.

(*l*) 3 Bla. Com. 87, 88.

(*m*) *Parham v. Templar*, 3 Phil. R. 254.

CHAP. V.
SECT. X.

Jurisdiction principally depends on locality of the defendant within the district.

One general rule of great importance is, that the Ecclesiastical Courts have not merely jurisdiction with reference to the locality of the *subject-matter*, but in the locality of the *person* cited; and, therefore, although the defendant may usually reside out of the kingdom, yet if he be served with a citation within the jurisdiction of an Ecclesiastical Court here, (as that of the Consistory Court of London in a suit there for nullity of marriage,) that Court has jurisdiction.⁽ⁿ⁾ So in matrimonial suits the power of the Court is *in personam*, and the Court cannot enforce a decree upon a party who is out of the kingdom;^(o) but if the party be in England, an Ecclesiastical Court has jurisdiction to try the marriage of English subjects wherever contracted.^(p) But generally speaking, as regards testamentary causes, all Ecclesiastical jurisdictions are limited in their authority to property locally situate within their district.^(q)

1. Causes pecuniary.
For Tithe.

1. *Causes pecuniary* include claims for *Tithes*, but when the *right* is disputed, these can only be instituted in the Ecclesiastical Courts between *spiritual* persons, and against *lay* persons only to compel the render of tithe in kind when the general right is admitted;^(r) and in the case of predial tithe, it is now usual to proceed by action at law, viz. for treble value incurred under the statute, by not setting out the tithe; or where there has been an agreement to pay a composition, by action of *assumpsit* or debt on such agreement; or when the dispute is between the tithe owner and several parishioners, or where a *modus* is insisted upon, then by a bill in Chancery, or, as we have seen, even more frequently on the equity side of the Court of Exchequer; and the latter suit in general is preferable, because full costs are recoverable in an equity suit for tithes in the Exchequer, unless there has been a previous adequate tender.^(s) When there has been an agreement for a composition, the remedy is usually at law, and it has been supposed that in such a case a suit in the Consistorial Court for subtraction of tithe is not maintainable, and that the composition need not be tendered; but recently Sir John Nicholl decided, on appeal from the Consistorial Court of Exchequer to the Arches

(n) Per Vice-Chancellor in *Donegal v. Donegal*, 3 Phil. 611, 586; and see *Morse v. Morse*, 2 Hagg. 610.

(o) *Morse v. Morse*, 2 Hagg. 610.

(p) In *Harford v. Morris*, 2 Hagg. Cons. R. 425.

(q) *Crosley v. Archdeacon of Sudbury*,

3 Hagg. Ecc. R. 197.

(r) 3 Bla. Com. 88, 89; and see *Meluish v. Facy*, *post*, 457, note (t).

(s) *Ante*, vol. i. 27, n. (u), 398, 399; *Stockwell v. Terry*, 1 Ves. 118; and 2 Madd. Chan. Pr. 556.

Court, that as the Ecclesiastical Court had power to interfere in cases of *modus*, he considered they had jurisdiction also in cases of composition, which were in effect *moduses* for the time being, and reversed the sentence below, and decreed that the value of the tithe, to be ascertained by the registrar, should be paid to the appellant with his costs. (t) In a suit by a clergyman for small tithe, he will in general recover his *costs* in the Ecclesiastical Court, although he succeed only in part, deducting the costs of the pleading relative to the unsuccessful part. (u) There is one advantage incident to a proceeding for tithe in the Ecclesiastical Court, viz. that although a party has been imprisoned for more than a year upon a sentence of the Ecclesiastical Court, and writ de contumace capiendo thereon, he will not be entitled to be discharged under the 48 G. 3, c. 132, but will be perpetually imprisoned until he has fully obeyed the sentence. (x)

Ecclesiastical dues to the clergy, as pensions, mortuaries; compositions, offerings, and whatever falls under the denomination of surplice fees for marriages or other ministerial offices of the church, are also recoverable in the Ecclesiastical Court. (y) But *curates' salaries* are more usually recovered by action at law. (z) Claims in respect of *Spoliation* (a) or *ecclesiastical waste* or dilapidations, are also cognizable in these Courts, (b) but it is more usual to proceed for the latter by action at common law, (c) at least it is so against the personal representative of the late incumbent. (d) The instances of suits at law for ecclesiastical waste are confined to actions by a succeeding against a late incumbent, or against his executors; but the jurisdiction of the Consistory Court is more extensive, for a sequestrator of a benefice being bound to repair the vicarage-house and buildings, may be sued pending the sequestration by the bishop and churchwardens in the Bishop's Court, to compel him to repair; though after a sequestration has been entirely determined, such jurisdiction might be questionable. (e) On principle it should seem that every incumbent who permits the

For Ecclesiastical Dues, &c.

Spoliation, or ecclesiastical waste.

(t) *Melluish v. Facy*, Arches Court, 8th July, 1834, cor. Sir John Nicholl. See the libel and proceedings, *post*.

(u) *Layden v. Flack*, 2 Hagg. Cons. R. 309.

(x) *Ex parte Kaye*, 1 B. & Adol. 652. Courts of Equity have power to discharge a prisoner from the contempt, *ante*, 429; but there does not appear as yet any such power extended to Ecclesiastical Courts; and see *Barlee v. Barlee*, 1 Addam's R. 301.

(y) 3 Bla. Com. 89, 90.

(z) Cowp. R. 437; Dougl. 14; 3 Bla. Com. 90.

(a) 3 Bla. Com. 90.

(b) *Ibid.* 91, 92. In *Whinfield v. Watkins*, 2 Phil. R. 3, n. (a), it is said that suits for dilapidations are *most properly* and *naturally* to be in the Spiritual Courts.

(c) *Ante*, 393; *Bird v. Relfe and Wife*, 1 Nev. & Man. 415; 1 Bar. & Adol. 826, S.C.; 2 Phil. R. 3, note (a); *Wise v. Metcalfe*, 10 B. & C. 299.

(d) *Sollers v. Lawrence*, Willes, 420, 421.

(e) Per Sir William Scott in *Whinfield v. Watkins*, 2 Phil. R. 8.

CHAP. V.
SECT. X.

buildings belonging to his benefice to continue dilapidated, might be prosecuted by the bishop and churchwardens in the Consistory Court so as to compel him to repair; and where existing dilapidations are daily increasing, such a proceeding would be proper, instead of waiting until his decease, perhaps without leaving assets; and this seems to be the only Court in which a bishop, or other ecclesiastical person *still in possession of his benefice*, can be compelled to repair. (f) In a preceding page we have seen the nature and extent of the repairs which an incumbent is bound to make. (g) So a suit may, if the facts warrant, be sustained by churchwardens against a bishop, as impropiator of a portion of great tithes of the parish, to compel him to repair the chancel; (h) and if a custom for the parishioners to repair be pleaded, a prohibition goes to the Ecclesiastical Court, and such question of fact will be heard in a Court of Law by a jury, and if found in favour of the bishop, will be conclusive; and the Ecclesiastical Court cannot investigate whether the alleged custom be illegal; (i) and the impropiator will therefore be entitled to be dismissed with all his costs incurred in the Ecclesiastical Courts. (i)

2. Matrimonial
causes.

2. We have seen that Courts of Equity have not in general any direct jurisdiction over *matrimonial causes*, but that they are exclusively taken cognizance of in the Spiritual Courts, (k) especially in cases of clandestine marriages, (l) although the Chancellor may direct that the marriage of a ward in Chancery shall be repeated more formally. (m) But the Ecclesiastical Court cannot annul a marriage after the death of one of the parties, as it might bastardize the issue, (n) though it may proceed to punish the survivor, as for incest; (n) and a sentence of divorce on the ground of incest may be *repealed* by the Spiritual Court after the death of the parties. (o)

Matrimonial causes are of several descriptions, as *first*, suits for a *malicious jactitation*, or boasting of a pretended marriage with the complainant without his consent, when there has been no marriage in fact; (p) *secondly*, suits for *nullity of marriage* on account of force or fraud, (q) or incest, or too near

(f) *Ante*, 359, 360, 388.

(g) *Ante*, vol. i. 393. As to the question how far a bishop may be prohibited or prevented by injunction from committing or permitting waste, *ante*, 359, 360.

(h) *The Bishop of Ely v. Gibbons and another*, on appeal, 4 Hagg. Ec. R. 156.

(i) *Ibid.* 163, 164.

(k) *Ante*, 434; *Hatfield v. Hatfield*, 5 Bro. C.C. 100; and see in general Chit. Eq. Dig. tit. Courts, II. Ecclesiastical; 3 Bla. Com. 92 to 95.

(l) *Middleton v. Crofts*, 2 Atk. 668, 671.

(m) *Ante*, 435, note (e).

(n) 3 Bla. Com. 440; Cro. Jac. 186; *Brownward v. Edwards*, 2 Ves. 245; *Elliot v. Gurr*, 2 Phil. R. 19, 21, 22.

(o) Co. Litt. 33, 244; 5 Co. 98; 7 Co. 44; Cro. Jac. 186.

(p) *Lord Hawke v. Corri*, 2 Hagg. Cons. R. 284.

(q) *Harford v. Morris*, 2 Hagg. Cons. R. 423; *Ewing v. Wheatley*, *id.* 175.

relationship; or incapacity to consent; or want of actual consent, as in case of lunacy; or great mental weakness imposed upon by fraud, and which may be instituted by the committee; (*q*) or for want of due form, as misnomer in publication of banns; or on account of impotency or sterility; *thirdly*, suits for *restitution of conjugal rights*; *fourthly*, suits for *divorces* on account of cruelty or adultery; and *fifthly*, suits for *alimony*. (*r*)

With respect to a suit for *jactitation of marriage*, though of rare occurrence, yet if a person pretend a marriage which has no existence whatever, and proclaim it to others, the law considers it a malicious act, subjecting the party against whom it is set up to various disadvantages of fortune and reputation, and imposing upon the public (which for many reasons is interested in knowing the real state and condition of the individuals who compose it) an untrue character, and interfering in many possible consequences with the good order of society, as well as the rights of those who are entitled to its protection. (*s*) It is therefore a fit subject of redress; and this redress is to be obtained by charging the supposed offender with having *falsely and maliciously* boasted of a matrimonial connection; and upon proof of the fact, obtaining a *sentence*, enjoining him or her to abstain in future from such false and injurious representations, and punishing the past offence by a condemnation in the costs of the proceeding. (*s*) To such a suit there may be three different defences; 1st, a denial of the jactitation or boasting; 2d, an assertion that a marriage actually passed, (and then the suit assumes another shape, that of a suit for restitution of conjugal rights); 3d, a defence of more rare occurrence, viz. that though no marriage has passed, yet the pretension was fully authorized by the complainant; and that therefore, though the representation was false, yet it was not malicious, and cannot be complained of as such by the party who authorized it; (*t*) and therefore where a person had lived in adulterous connection with the wife of another man, and every where introduced her as his wife, his suit for malicious jactitation was dismissed. (*u*)

Suits for jactitation.

With respect to suits for *nullity of marriage*, any party interested, though a third person, and even a committee of a lunatic, or a person claiming an estate in remainder on failure

Suits for nullity of marriage.

(*q*) *Parnell v. Parnell*, 2 Hagg. Cons. R. 169; *Portsmouth v. Portsmouth*, 1 Hag. Ecc. R. 355.

(*r*) 3 Bla. Com. 92 to 95.

(*s*) Per Sir William Scott, in *Lord Hawks v. Corri*, 2 Hagg. Consist. R. 285.

(*t*) *Ibid.* 285, 286.

(*u*) *Ibid.* 292.

CHAP. V.
SECT. X.

of issue, may institute a suit for nullity of marriage in the Consistory Court, (x) or may *intervene* in a Court of Appeal; (y) and in general there should, for greater security, whilst parties and witnesses are living, be a sentence in the Ecclesiastical Court, though the marriage be absolutely void, as in the case of lunacy. A father of a minor has a right to institute and prosecute a suit for nullity of marriage against the will of the minor. (z) If the ground be a publication of banns in a wrong name, as Coxon Tongue, when the correct name is *Edward Coxon Tongue*, it must be proved that such an erroneous publication was with the knowledge of the parties. (a) And we have seen that an Ecclesiastical Court will not annul a marriage by banns unless there was express or implied fraud in the transaction, as by false names for a fraudulent purpose. (b) But if such a fraud be proved, the marriage will in general be void, as even the omission of one Christian name. (c)

A sentence of *nullity of marriage* may be obtained *propter impotentiam* or *sterility* in either sex, when it can be shewn to have existed at the time of the marriage; suits of that nature have certainly occurred even in modern times, but they are comparatively rare. (d)

Suits for restitution of conjugal rights.

Suits for *restitution of conjugal rights*, when one of the parties refuses to cohabit, are not unfrequent, and have been sometimes adopted as a mode of trying the validity of the marriage, which must be charged to have taken place. If the complainant, whether wife (e) or husband, (f) succeed, the sentence of the Court is, that the party is the lawful wife or husband of the opponent, and that the latter, if an husband, do receive her home in the character of a wife, and do treat her with conjugal affection, and do certify to the Court that he has done so by the first sessions of the next term. And if such sentence be disobeyed, the party will be perpetually imprisoned under process from a Court of Law, as in other cases. (f) The Courts in

(x) *Donegal v. Chichester*, 3 Phil. Ecc. Rep. 590, 592, 593; 1 Add. R. 16, S. C.; and see *Parnell v. Parnell*, 2 Hagg Consist. Rep. 169; *Portsmouth v. Portsmouth*, 1 Hagg. Ecc. Rep. 355.

(y) *Ex parte Turning*, 1 Ves. & B. 140; *Donegal v. Chichester*, 3 Phil. R. 593, note (b); and see *post* as to *Intervention*.

(z) *Bowyer v. Ricketts*, 1 Hagg. Cons. R. 214, 215.

(a) *Tongue v. Allan*, Consistory Court, London, 5th July, 1834, per Dr. Lushington. And see form of the libel in such a suit *post*.

(b) *Ante*, vol. i. 55.

(c) *Ante*, vol. i. 53, and notes; *Periget v. Tomkins*, 2 Hagg. Consist. R. 142; *Wyatt v. Henry*, *ibid.* 215; *Sullivan v. Sullivan*, *ibid.* 238; *supra*, note (a).

(d) See instances and observations, Chitty's Medical Jurisprudence, 374, 375; see instances of such suits against the woman, *Guest v. Shipley*, 2 Hagg. Cons. R. 321; *Briggs v. Morgan*, *ibid.* 324; against the husband, *Greenstreet v. Cumyns*, 2 Hagg. Cons. R. 332.

(e) *Dalrymple v. Dalrymple*, 2 Hagg. Cons. R. 54, 157.

(f) *Barlee v. Barlee*, 1 Addams, 501; *Swift v. Swift*, 4 Hagg. Cons. R. 139.

general regret the legal necessity for pronouncing such a sentence, because it inflicts upon one, if not both the parties, great distress, and is scarcely possible to be productive of any happiness, and occasions perpetual imprisonment in case of continued disobedience of the sentence. (g) Perhaps the same reasons which induced the legislature to enact that no promise to marry should be specifically enforced in the Ecclesiastical Court should lead to a modification of this law.

The cases, when or not an Ecclesiastical Court will divorce a mensâ et thoro have been cursorily considered in the preceding volume; and we have there seen that the only grounds of divorce arising *after* marriage, are either such *intolerable cruelty* as amounts to what is technically though somewhat singularly termed *legal sevitiæ*, or cruelty, (h) or guilt by the husband of some infamous unnatural crime or practice, (i) or adultery. The Courts have judiciously declined to define what *degree* or instances of cruelty will amount to the *legal cruelty* necessary to be established; but the numerous cases in the books establish that mere bad temper, harshness or unkindness, are not sufficient grounds of divorce. (k)

Suits for divorce
for cruelty or
adultery.

In order to obtain the assistance of this Court, the parties applying on account of *adultery* must be free from similar imputation; and therefore a husband cannot obtain a divorce in the Ecclesiastical Court if the wife recriminate and establish that he had also been faithless to the marital vow, (l) whether before or not until *after knowledge of her infidelity*; (m) so if a husband be so insensible of the injury as to cohabit with his wife after knowledge of her infidelity, (n) then in either of these cases the Ecclesiastical Court will not interfere at his instance.

By the practice of the Court a matrimonial suit frequently changes its *original* object, and this even on a collateral ground. Thus in a suit against a woman for jactitation of marriage, if she plead that she and the complainant were duly married, and she establish the fact, the sentence will be restitution of her conjugal rights. (o) And in a suit by a wife for *restitution of conjugal rights*, if the husband, in defence or

(g) See observations in *Dalrymple v. Dalrymple*, 2 Hagg. Cons. R. 183.

(h) *Ante*, vol. i. 59; per Dr. Lushington in *Neeld v. Neeld*, 6 Dec. 1831, 4 Hagg. Ec. Cas. 264; and see that case at length in supplement to this work of A. D. 1834 to vol. i. 59. See instances of divorces for cruelty and violence. *Harris v. Harris*, 2 Hagg. Cons. R. 148; *Waring v. Waring*, *ibid.* 158. It may be answered by necessary self-defence. *Waring v. Waring*, *ibid.* 168.

(i) *Ante*, vol. i. 59.

(k) See *Neeld v. Neeld*, 4 Hagg. Eccl. Cases, 264, and *ante*, vol. i. 59.

(l) 1 Ought. 317; Burn's Eccl. L. Marriage, xi.

(m) *Procter v. Procter*, 2 Hagg. Cons. Rep. 292.

(n) 1 Ought. 317; Burn's Eccl. L. Marriage, xi.

(o) Per Sir W. Scott in *Hawke v. Corri*, 2 Hagg. Cons. R. 285, 286.

CHAP V.
SECT. X.

excuse, allege the adultery of the wife, he may in that very suit pray and proceed for a divorce on the latter ground. (*p*) So in a suit against the husband for cruelty, a defensive allegation, pleading distinctly and substantially adultery by the wife, is admissible without a separate citation on the part of the husband. (*q*) So a wife has been permitted, in a suit instituted against the husband for cruelty, to give in additional articles to the libel pleading acts of adultery by the husband, (*r*) especially if they have recently, and since the institution of the suit, come to her knowledge. (*s*)

In a suit by a husband for *divorce* on the ground of adultery, if the wife's allegation responsive to his libel plead that adultery was committed by the husband, he may meet the same by a defensive plea, and then the wife may afterwards offer additional articles negating parts of the husband's defensive allegation, and the latter will be admissible, although a fourth allegation, because they may afford the Court better means of arriving at a just conclusion. (*t*)

Suits for Alimony, and costs pending suits for divorce. (*u*)

The jurisdiction of the Spiritual Court, in decreeing *alimony*, is incidental to a decree of divorce; and generally speaking alimony cannot be otherwise obtained, excepting indeed in cases of agreement, when we have seen the Court of Chancery may interfere, (*x*) or excepting by act of parliament, when there has been a divorce there. (*y*) In general, where there is a decree of divorce in the Ecclesiastical Court, on account of the established adultery of the wife, no decree of alimony follows; but upon a divorce bill in the Lords, on account of the adultery of the wife, the husband is always required to make provision for maintenance, lest by total destitution she should be driven to continue in a course of vice. (*z*) In suits instituted either by

(*p*) *Lambert v. Lambert*, Consistory Court, London, July 5, 1834.

(*q*) *Best v. Best*, 1 Addams, 441.

(*r*) *Barrett v. Barrett*, 1 Hagg. Eccl. Rep. 22.

(*s*) *Sampson v. Sampson*, 4 Hagg. Rep. 285.

(*t*) *Sarjeant v. Sarjeant*, Consistory Court, Friday, June 27, 1834. Per Dr. Lushington.

This was a suit which had been frequently before the Court on admission of allegations. It was promoted by Captain James Sarjeant against Harriet his wife, for a divorce on the ground of adultery. In the allegation responsive to the libel, the wife pleaded adultery committed by the husband, which the latter met by a defensive plea, and additional articles were now offered on behalf of the wife, the object of which was to negative cer-

tain parts of the husband's defensive allegation.

After hearing Dr. Phillimore and Dr. Addams for the husband, against the allegation, and the King's Advocate and Dr. Burnaby, for the wife,

Dr. Lushington considered that the articles were, under the circumstances, admissible, though this was a *fourth* allegation, as they might afford the Court better means of arriving at a just conclusion.

(*u*) See in general 1 Bla. Com. 441, and notes.

(*x*) *Ante*, 434, 435.

(*y*) Dick. 791; see *ante*, vol. i. 58, note (*u*); *ibid.* 60.

(*z*) *Jes v. Thurlow*, 4 D. & R. 17; but it would be well to make her future chastity and separation from her paramour an indispensable condition of the continued

the husband or the wife, the latter is a privileged party as to costs, and is entitled to *alimony pending the suit*, on the principle of the whole property being by law vested in the husband, and her consequent incapacity to support or defend herself during the coverture. If the wife, therefore, be under the necessity of living apart, it is also necessary that she should be *subsisted during the pendency of the suit*, and that she should also be enabled to *procure justice* by being provided with the means of defence. This arises out of the ordinary condition of conjugal society, and the state of the property between the parties as usually vested in the husband, under the more ancient law of the kingdom. (a) But after the adultery of the wife has been established by the decree, it would in general be unjust, excepting upon the principle acted upon in the House of Lords, to require the husband to pay alimony, and therefore there is no instance in the Ecclesiastical Court of a decree of alimony in such a case. (b)

If a wife be reluctant to institute a suit for a divorce in the Spiritual Court, she may at law, whilst resident with her husband, or at a place prescribed by him, (c) or when compelled to leave him by legal cruelty, subject him to the payment of all necessaries according to his fortune and rank, by contracting debts for necessaries in his name.

But when the wife has a sufficient independent or separate income, as £400 a year, and the husband the same, no alimony or costs pending the suit will be allowed, (d) though where her pin-money is small, the Court will add some alimony pending the suit. (e) When she has not, then, in case of a divorce for the misconduct of her husband, she is entitled to alimony, the *general proportion* of which, it is said, is rather higher than one-sixth, or about one-fifth of the income of the husband, to be paid from the date of the decree; (f) and even a moiety of the property has been given where the wife brought the whole of the property and she was blameless; (g) and although the husband pretend to have assigned away all his property, he may nevertheless be compelled to pay alimony pending the suit

payment. In France the wife and paramour are compellable to separate.

(a) Per Sir W. Scott, *Wilson v. Wilson*, 2 Hagg. Cons. R. 204; and see *Beevor v. Beevor*, 3 Phil. R. 261; *Portsmouth v. Portsmouth*, 3 Addams R. 63.

(b) 3 Bla. Com. 94, 95; nor is a husband liable for necessaries in such a case, *R. v. Flinton*, 1 B. & Adol. 227.

(c) *Montague v. Benedict*, 3 B. & C. 631; *Seaton v. Benedict*, 5 Bing. 28; *Hunt v. Blaquore*, 5 Bing. 550.

(d) *Briscoe v. Briscoe*, 2 Hagg. Cons. R. 199; *Wilson v. Wilson*, id. 204, 205; *Beevor v. Beevor*, 3 Phil. R. 261.

(e) *Briscoe v. Briscoe*, 2 Hagg. Cons. Court, 199; *Beevor v. Beevor*, 3 Phil. R. 261.

(f) *Briscoe v. Briscoe*, 2 Hagg. Cons. R. 199; *Rees v. Rees*, 3 Phil. R. 392; *Cox v. Cox*, 3 Addams's R. 276.

(g) *Cooke v. Cooke*, 2 Phil. R. 40; *Smith v. Smith*, 2 id. 235.

CHAP. V.
SECT. X.

for a divorce on account of adultery, at the rate of £50 per annum out of £140 per annum; (h) and the reduction of the husband's income by unprofitable speculations, is no ground for a proportionate reduction of permanent alimony allotted many years before. (i) But it is otherwise when his income has decreased without any fault on his part. (j) The arrears of alimony ought to be enforced from year to year, for after greater delay the Ecclesiastical Court will not in general assist. (k) In a late case the executors of the will of a married lady filed a bill in the Vice-Chancellor's Court against the husband to compel him to pay the arrears of alimony, and the defendant demurred; and the Vice-Chancellor, after taking time to consider, inclined to be of opinion that the Ecclesiastical Court, notwithstanding the death of the wife, possessed the power of enforcing payment of the arrears of the alimony, and that, therefore, the bill in equity was unnecessary; but that being in a state of doubt on the subject, he would not go the length of saying that the bill could not be sustained, and therefore overruled the demurrer, reserving the consideration of costs until it had been decided whether the Ecclesiastical Court had or had not jurisdiction in the case. (l) In all suits of nullity of marriage brought by or on the part of the husband, the wife *de facto* is regularly entitled as well to alimony pending suit as to payment of all such costs as she incurs in her defence. (m).

3. Testamentary
causes. (n)

Thirdly, *Testamentary Causes*. The Ecclesiastical Courts, and especially the Consistorial and Prerogative Courts, have original, and in some cases, *exclusive* jurisdiction upon questions regarding the *validity* of wills relating to *personalty*; and we have seen that a Court of Equity has no jurisdiction to determine on the *validity* of a will, (o) the granting of probate or letters of administration, and taking and assigning administration bonds, (p) though afterwards the action for a breach of the condition is to be brought in a temporal Court. And if one of these Courts has granted probate, the validity of the will

(h) *Brown v. Brown*, 2 Hagg. R. 5.(i) *Neil v. Neil*, 4 Hagg. 273.(j) *Cox v. Cox*, 3 Addams, 276.(k) *De Blaquere v. De Blaquere*, and *Wilson v. Wilson*, 3 Hagg. Eccle. Cas. 322, 329, n. (c).(l) *Stones v. Cox*, Vice-Chancellor's Court, 25th and 27th June, 1854; Sir E. Sugden for plaintiff, Knight for defendant. Dower is not recoverable after death of widow, *White v. Parnther*, 1 Knapp's R. 226.(m) *Portsmouth v. Portsmouth*, 3 Add. R. 63.

(n) See in general 3 Bla. Com. 95 to 99, and notes; Com. Dig. Prohibition, G. 16.

(o) *Ante*, 435; *Hughes v. Turner*, 4 Hagg. Eccle. R. 40, 41, n. (a), 48; *Jones v. Jones*, 3 Meriv. 161.(p) 22 & 23 Car. 2, c. 10; 1 Madd. Chan. Pr. 626 to 628; *ante*, vol. i. 552, 716 a; *post*.

cannot be disputed if the testator be dead, at least in any *civil* proceeding, (although it may in a criminal prosecution,) until the probate has been set aside in the proper Ecclesiastical Court.(q) But the ecclesiastical judges admit that a Court of Equity is the fittest jurisdiction to decide upon the validity of an appointment in or by a will, and will therefore endeavour to put the question in a course of inquiry there;(r) and it is admitted that the Ecclesiastical Court has no authority to decree the execution of a trust.(s) It would be beyond our present object to enumerate when or not instruments in questionable form have been decreed to be valid testaments as regards *personal* property.(t) It has been held that written instructions for a will, taken down by an attorney from the deceased's dictation, and not signed by him, was a sufficient will;(u) and where a testator wrote a paper as his will, but left it incomplete for want of signature and attestation, which requisites he intended up to the time of his death to add, but was prevented from effecting by what is commonly termed the act of God, such paper was established as a will.(x) So an entry in an account-book, containing a full disposition of the property and appointment of executor, and dated eight months before the testator's death (which was sudden), and subscribed and carefully preserved, was pronounced for, though containing these words:—"I intend this as a sketch of my will, which I intend making on my return home."(y) And a will made by questions and even leading interrogatories, as, "do you mean to give your money at your bankers' to me?" and the testator thereupon verbally answered "yes," and the donee wrote such answer following the interrogatory, may be valid,(z) and a will or codicil in pencil is sufficient.(a)

But we have seen that Courts of Equity, whether Chancery or Exchequer, exercise a concurrent and more efficacious jurisdiction in compelling executors and administrators *to account and distribute*;(b) and the Court of Chancery has powers as extensive as those of the Court of Probate to receive evidence which may explain any *ambiguity* on the face of a will.(c)

(q) *Allen v. Dundas*, 3 T. R. 123; *Pinney v. Pinney*, 8 B. & C. 335; 1 Stark. Ev. 243.

(r) Per Sir John Nicholl, 4 Hagg. Ec. Cas. 47.

(s) *Hughes v. Hughes*, 4 Hagg. Ec. Cas. 49; *Ex parte Jenkins*, 1 B. & C. 655.

(t) See in general, *ante*, vol. i. 110, 111; 2 Bla. Com. 502, n. (16); and Williams's Law of Executors.

(u) *Huntington v. Huntington*, 2 Phil. Eccle. Cas. 213.

(x) *Scott v. Rhodes*, 1 Phil. Ec. Cas. 12.

(y) *Hallatt v. Hallatt*, 4 Hagg. R. 211.

(z) *Green v. Skipworth*, 1 Phil. Eccle. Cas. 58.

(a) *Rymer v. Clarkson*, 1 Phil. Ec. Cas. 22.

(b) *Sharpley v. Sharpley*, M'Clel. R. 506; *ante*, 423, 424, 435; 1 P. Wms. 544, 575; Com. Dig. Prohibition, G. 16; 3 Bla. Com. 95, n. (18); *ante*, vol. i. 112, 551, 552.

(c) 3 Phil. R. 480.

CHAP. V.
SECT. X.

One defect and want of adequate security in granting administration in the Ecclesiastical Courts is, that the two sureties required by the statute to execute the administration bond cannot be compelled to state the nature of their property, or where it is to be found; (*d*) though the parties interested in the fund may, by due attention, insist on sufficient sureties *justifying* generally, as the statute requires two or more *able* sureties. (*e*)

Where there has been no witness to a will, probate in the common form of an unattested will was granted on the affidavit of *one person only* to the testator's handwriting, and upon the consent of the sole person who would have been entitled to distribution if the testator had died intestate. (*f*) But mere similarity of handwriting will not suffice to prove the execution of an unattested will. (*g*) If a will once proved to have existed be not forthcoming, the presumption of law is, that the *testator* himself destroyed it, and therefore a copy will not be admitted to probate. (*h*)

Legacies. (*i*)

The Ecclesiastical Courts have proper jurisdiction over *personal legacies* charged upon or to be paid out of mere *personal* estate; (*k*) and upon the construction of a will respecting the same, as whether a bequest "to each of my servants living with me at the time of my death £10," extended to a job coachman who had served her for a considerable time. (*l*)

But an injunction may be granted in Chancery to restrain a husband's suit in the Ecclesiastical Court for a legacy to his wife, he not having made a settlement. (*m*) So when there is a *trust* affecting a legacy, Chancery will interfere; (*n*) but where an executor has no trust to execute, excepting that of merely *paying* the legacy, or where the purposes of a trust have expired, then the Ecclesiastical Court has jurisdiction. (*o*) When the estate of the deceased is considerable, or the legacy large, a suit in Chancery or the Exchequer, against the executor, may be more effectual to secure the fund and a due distribution than any suit in the Ecclesiastical Court; (*p*) but when the

(*d*) 22 & 23 Car. 2, c. 10; 2 Phil. R. 280. See observations in *Devey v. Edwards*, 3 Addams' R. 78; *post*, 502.

(*e*) 22 & 23 Car. 2, c. 10, s. 1, *post*.

(*f*) *In re goods of Mary Keeton*, 4 Hagg. R. 1.

(*g*) *Rutherford v. Maule*, 4 Hagg. 224.

(*h*) *Wargelt v. Hollings*, 4 Hagg. 245.

(*i*) See in general *Grignion v. Grignion*, 1 Hagg. R. 537; *post*, 498.

(*k*) *Bassett v. Bassett*, 3 Atk. 297; *Reynish v. Martin*, *id.* 333; 3 Hagg. R. 161, in note; *aliter*, if charged on realty, *ante*, 465, (*s*).

(*l*) *Howard v. Wilson*, 1 Hagg. Eccle. R. 107.

(*m*) *Meals v. Meals*, Dick. 373; 1 Atk. 491. In the Ecclesiastical Court a wife may sue *alone* the executor for a legacy given to her separate use, see *Capel v. Roberts*, 3 Hagg. R. 161, in note.

(*n*) 1 Atk. 491; *Grignion v. Grignion*, 1 Hagg. 535; *ante*, 465, (*s*).

(*o*) *Grignion v. Grignion*, 1 Hagg. R. 535, where see the whole law on the subject of this ecclesiastical jurisdiction.

(*p*) *Sharpley v. Sharpley*, M'Clel. Rep. 506.

legacy is small, it is in general most judicious for a legatee to institute a suit against the executor in the Arches Court, when the will has been proved in the Prerogative Court of Canterbury. (q) The simple mode pursued in the Ecclesiastical Court of enforcing payment of a legacy, as observed by Dr. Haggard, and presently stated fully, is very convenient and summary, and avoids the necessity for resorting to Chancery, and though but little known should be constantly resorted to, especially when the legacy is small. (r) This jurisdiction is exercised by the Arches Court in cases of all wills proved in the Prerogative Court, and by the official principals of each diocese in cases of wills proved in a Diocesan Court; and the course of proceeding in the Arches Court is there prescribed, and which will presently be stated. (s) In a recent case a suit of subtraction of legacy of so small a sum as 10*l.* was instituted in the Arches Court and the executrix condemned, with full costs and censure, for resisting and occasioning so much expense. (t) But in some cases the legatee should be prepared to give security to refund, where there is a possibility of creditors appearing. (u) An executor, after the lapse of a year, may even at any distance of time be called upon and sued in the Ecclesiastical Court, so as to compel him to pay a legacy upon condition that the legatee give security to refund in case the amount of his legacy should be required in discharge of debts. (x) Where a legacy has been given to the separate use of the wife in exclusion of the husband's interference, the suit is to be instituted in her *name separately* against the executor, and the husband or his assignee is only to be cited *pro forma*. (y) When an executor or administrator has expressly promised to pay a legacy in consideration of forbearance, and has assets, then we have seen that in general an action at law may be sustained, but not otherwise. (z)

4thly. *Suits for Defamation* are frequently instituted in the Ecclesiastical Courts, but as no damages are there recoverable and there is no penance excepting compulsory admission of the complainant's innocence, asking forgiveness, and payment of costs, there is not much inducement to sue. (a) In case

4. Defamation. (a)

(q) See an instance *Norris v. Hemingway*, 1 Hagg. R. 4, *post*, 498.

(r) *Capel v. Roberts*, 3 Hagg. R. 161, n. (a); see *post*, 498, *Arches Court*.

(s) *Id. ibid.* and see *post*, 498, *Arches Court*.

(t) *Howard v. Wilson*, 4 Hagg. R. 107.

(u) *Higgins v. Higgins*, 4 Hagg. 242.

(x) Per Sir J. Nicholl, *Higgins v.*

Higgins, 4 Hagg. R. 244.

(y) *Capel v. Roberts*, 3 Hagg. Ecc. Rep. 161, in note, and *post*, 498, *Arches Court*.

(z) *Ante*, vol. i. 550, 551.

(a) Burn's Eccl. L. Defamation; Com. Dig. Prohibition, G. 14; Bac. Ab. Slander, T. U.; Starkie on Slander, 32, 474. See form of citation and libel for defamation, *post*, 486, 487.

CHAP. V.
SECT. X.

of *verbal* slander, when the opprobrious words merely imputed an immorality punishable only in the Ecclesiastical Court, as calling a woman a *whore* or *bawd* or less explicit charge of fornication, if no special damage can be proved, a suit in the Spiritual Court is the only remedy, and in many cases it may with propriety be resorted to; and as regards personal considerations the humiliating sentence of an Ecclesiastical Court, compelling such admission of innocence and apology and payment of costs, may afford some degree of satisfaction to the insulted individual. Actions at *law* for *slander* are of more frequent occurrence, but unless attended with very aggravating circumstances are there sometimes treated with ridicule; we have ventured to suggest that they ought not to be discouraged, at least in cases when, if redress be denied, the party calumniated might be induced to revenge himself; (b) but there is no remedy at *law* for *verbal* slander, merely imputing some ecclesiastical or spiritual offence, as fornication. (c) The remedy in the Ecclesiastical Court for slander is limited to six calendar months. (d) The *verbally* calling a person heretic, adulterer, fornicator, whore, drunkard, &c. may be prosecuted in an Ecclesiastical Court; but if the words were coupled with others for which an action at law would lie, as calling a woman a whore and a thief, or "she keeps a bawdy house," which is an *indictable* offence, then the Ecclesiastical Court has no jurisdiction, and a prohibition lies, the rule being *mere spiritualia sunt quæ non habeat mixturam temporalium*. (e) And a prohibition lies to a Spiritual Court to stay proceedings for calling a woman a whore in *London* or *Bristol*, on affidavit of the custom in those places giving an action in the local Courts there for that imputation. (f) But if part of the words impute only a spiritual offence, then after sentence a prohibition will not be issued to the Spiritual Court, although other words were actionable at law; as imputing to a woman that she was a whore and had given several men the bad disorder. (g) The Ecclesiastical Court has not jurisdiction unless the defamation imputed to the plaintiff the guilt of some offence punishable in that Court; thus to call a person "a common swearer" is not actionable, because the modern doctrine is that cursing and swearing are not

(b) *Ante*, vol. i. 23 a, n. (b).

(c) *Ante*, vol. i. 13.

(d) 27 G. 3, c. 44, s. 1, 2.

(e) 2 Inst. 488; 2 Rol. Ab. 295, 297; 1 Sid. 404; 2 Ld. Raym. 809, 1101; 3 Mod. 74; 2 Salk. 552; *Crampton v. Butler*, 1 Hagg. Consist. Rep. 465 in

notes; *post*, 477, (e).

(f) *Brant v. Roberts*, 4 Burr. 2418; *Keyer v. Eastwick*, 4 Burr. 2032; *Power v. Shaw*, 1 Wils. 62.

(g) *Semble, Carlake v. Moppledoram*, 2 T. R. 473.

offences punishable in the Ecclesiastical Court. (*h*) Nor can a suit be instituted in the Ecclesiastical Court for a *written libel*, because any slander reduced into *writing* is remediable at law. (*i*)

It seems that in this Court not only a party guilty of speaking specific words, importing a particular or general charge of some spiritual offence, may be prosecuted, but also a person guilty of maliciously using general opprobrious and uncharitable expressions, tending to destroy brotherly charity, may be sued; (*k*) such as "thou art a dishonest liver," or "thou art a liar or knave," or "thou art not to be trusted upon thy word or oath more than a dog;" and it is said that a libel in such a suit ought always to state as well the particular defamatory words as also general terms of reproach, because the party might recover upon the latter in case the former should not be proved. (*l*)

In general, in a suit for defamation in a Spiritual Court, some slanderous words must be proved by *two* witnesses; but it is not essential that they should both speak precisely to the identical words in the same terms; nor is it necessary that the name of the complainant has been used, provided it appear from the same or other words who was the party intended to be calumniated, (*m*) and it seems sufficient if one witness prove defamatory words uttered at one time, and another witness at another; (*n*) or in other words, one witness to the fact and one to the circumstances is sufficient. (*o*)

In the case of *Cole v. Corder*, in the Arches Court of Canterbury, upon an appeal from the Commissary Court of Surrey, (*p*) Sir John Nicholl observed, "It is sometimes said that suits of this kind are to be discouraged by the Courts; and when suits arise between persons of the *lowest description*, the Court may lament that the parties should incur a ruinous expense; but it is necessary that the law should interpose to prevent the effects of malevolence: and the law gives no remedy in this case but by an application to this Court. In the

(*h*) *Harris v. Buller*, Arches Court, 1 Dec. 1798, referred to in note † to *Crompton v. Butler*, 1 Hagg. Cons. Rep. 463.

(*i*) *R. v. Curl*, Str. 790; Mo. 627; Comb. 71; Bac. Ab. Courts Ecclesiastical, D.; Burn, Ecc. L. tit. Defamation, accord. In *Ware v. Johnson*, 2 Lee, Ecc. Cas. 103, A.D. 1755, it seems to have been reported otherwise, and that for this *writing*, "I do certify that E. J. keeps a whore in his house," might be proceeded for in the Ecclesiastical Court; but note there was also in that case *distinct verbal* slander to the same effect, and which would sustain the suit in that case. Besides that case

was decided long before the case of *Thorley v. Kerry*, 4 Taunt. Rep. 355, and other cases, which establish that any calumnious charge in *writing* is now actionable.

(*k*) *Ante*, vol. i. 44, 45; Oughton.

(*l*) Oughton, 46, 47.

(*m*) *Crompton v. Butler*, 1 Hagg. Cons. Rep. 468; *Cole v. Corder*, *Smith v. Watkins*, *ibid.* 467; 2 Phil. Rep. 106.

(*n*) *Crompton v. Butler*, 1 Hagg. Cons. Rep. 460, 463.

(*o*) *Hutchins v. Denziloe*, 1 Hagg. Cons. Rep. 182.

(*p*) *Cole v. Corder*, 2 Phil. Ecc. Cas. 109.

CHAP. V.
SECT. X.

present instance the parties are in the *middling rank* of life ; and it is necessary that there should be a remedy for a real injury ;” and Sir John Nicholl said, that although the suit in the Commissary Court of Surrey for calling the plaintiff a common whore, had been dismissed with costs, the superior Court was not reluctant to apply the remedy which the law enjoined, and he reversed the sentence of the Court below, and pronounced the libel proved, and condemned the defendant with costs in both Courts. And in a subsequent case in the Arches Court, on appeal from the Consistory Court of Exeter, (q) the same learned judge observed, “ I cannot agree that suits of this description between persons in the higher classes of society ought to be discouraged and less attended to than suits of a similar description between persons in a low condition of life ; on the contrary, in the higher classes of society, acquiescence would be almost an admission of the charge ; and as in those classes female reputation is of a higher importance and value to the person who possesses it, if an attempt be made to rob any one of that reputation, there is no other remedy but a reference to this Court, in which the law and constitution of the country have placed the cognizance of such offences ; and the defamatory words having been, ‘ *Ayre’s sister was publicly kept by a man at Plymouth, and had a child by him,*’ the sentence of the Consistory Court was affirmed with costs.” (r) And in another case, where, after sentence, the defendant had appealed, and had in his original notice given to the complainant of the time of performing penance, subscribed himself “ your’s affectionately,” Sir John Nicholl decreed that he should perform penance again, because the notice was given in an insulting manner, observing, that if an injury to an individual has been done, or the law has been violated, the most honourable and creditable mode is to make the amends which the law requires ; such amends being due to society, whatever may be the private feelings and opinions of the party towards his adversary. (s)

But in a suit of this nature the Spiritual Court is bound to allow the defendant the advantage of any *justification* which would have availed him at common law, as a plea *that the words were true*. (t) There is this peculiarity, that in the Ecclesiastical Courts a woman may sue alone without her husband for

(q) *Tucker v. Ayre*, 3 Phil. Ecc. Cas. 539.

(r) Per Sir John Nicholl, in *Tucker v. Ayre*, 3 Phil. Rep. 539 to 542.

(s) *Courtail v. Homfray*, 2 Hagg. Ecc.

Rep. 4, 5.

(t) Com. Dig. Prohibition, G. 14 ; Cro. J. 625 ; 2 Rol. Rep. 82 ; Starkie on Slander, 481 ; Burn’s Ecc. L. Defamation, 10, 11.

defamation, and though he might release the *costs*, yet he could not determine the suit, so as to release the defendant from the necessity of performing the enjoined penance; (*u*) and indeed where there was a libel in the Spiritual Court in the name of husband and wife, for calling the former cuckold, Lord Holt directed a prohibition, because they cannot both join in that Court for such words, but the wife should have sued alone, the imputation being only upon her, and the husband and wife by the law spiritual may not join in a suit in the Ecclesiastical Court as they must in the temporal, but each shall sue separately upon their own cause of action. (*x*) The statute 27 G. 3, c. 44, s. 1, limits suits for defamatory words to six calendar months. (*y*)

The *punishment* for defamation is payment of *costs* and *penance* enjoined at the discretion of the judge. If the slander was *privately* uttered, the penance may be directed to be performed in a private place; but if *publicly* uttered, then the penance is to be public, as in the church of the parish where the party defamed resides, in time of divine service, (but not covered with linen garments, as in cases of correction for fornication, &c.) and the defamer may be required publicly to pronounce that by such words, naming them, as set forth in the sentence, he had defamed the plaintiff, and therefore that he begs pardon and forgiveness, first of God, and then of the party defamed, for his uttering such words. (*z*) In a recent case, the sentence of the Arches Court was, that the defendant should, after giving twenty-fours notice at least thereof to Harriet, wife of C. C., repair in the day time to the *vestry room* of the parish church of ———, and there in the presence of the officiating *minister*, (*a*) and one of the churchwardens, (and who are to have the like notice,) and such other persons as the party complainant shall bring with her, audibly and distinctly make the following confession, viz. to the effect “that he had defamed Mrs. C., and that he asked her forgiveness, and that he would not again offend in the like manner.” (*b*) In a late case, in the Practice Court of the King’s Bench, a very learned judge, referring to the authority of the statute *Circumspecte Agatis*, (13 Ed. 1, stat. 4,) stated that the punishment of defa-

(*u*) Rol. Ab. 298; 10 Mod. 64; 3 Bulstr. 264; Stra. 576; Ld. Raym. 74.

(*x*) 3 Salk. 288.

(*y*) 27 G. 3, c. 44, s. 1; *Bowyer v. Ricketts*, 1 Hagg. Cons. R. 213, citing *Goldingay v. Hill*. It seems that before that statute the party had a year from the speaking of the words to join issue in such a suit.

(*z*) Clerks’ Assist. 225; 1 Bright, 392; 3 Burn Ecc. L. Defamation, pl. 14.

(*a*) If a sentence be that the penance shall be performed in the presence of the *minister*, it must not then also be, “and during divine service, &c.” *Courtail v. Homfray*, 2 Phil. Ecc. Cas. 4, *sed quare*.

(*b*) *Courtail v. Homfray*, 2 Hagg. Ec. Cas. 2, note (*a*), and *ibid.* 4.

CHAP. V.
SECT. X.

mation is to be enjoined at the discretion of the Ecclesiastical judge; and he held that a sentence that the defendant should, in the presence of the plaintiff, confess that he had scandalously abused her by saying that she was in the family way and had miscarried; and that he begged her forgiveness, and further to say, "*I believe her life and conversation to be sober, chaste and honest,*" was legal and sufficient. (c) The course and form of proceedings in a suit of this nature will presently be stated. (d)

5. Perturbation
or disturbance
of pews. (d)

5thly. Suits for *disturbance* (technically called *perturbation*) of pews or seats in a church or chapel are frequently the subjects of litigation in the Ecclesiastical Courts, and in such a suit every description of right to a pew or seat may arise and be discussed. But when the *legal right* is clear, an action on the case for the disturbance, or an action of *trespass*, if there has been an assault, may be preferable; (e) and in one case, where it appeared that the *temporal right* was the question, a prohibition was awarded, to prevent the continuance of a suit in the Spiritual Court for a disturbance in the church. (f) As a decree in the Ecclesiastical Court, even the Arches, respecting a pew, is not in all cases conclusive, and the decision there may be afterwards disputed in an action, it is obviously, when the *right* is in dispute, better to proceed at law. (g)

The right of *burial* in a particular vault or place we have seen is also sometimes a private claim discussed and determined in a Spiritual Court. (h)

Secondly, Jurisdiction over certain public matters and over certain offences.

Church rates.

The Ecclesiastical Courts have also considerable jurisdiction over *public matters* of a spiritual nature, as *church rates*, and over *ecclesiastical officers* and certain *offences* of a *spiritual* nature.

Church rates are *peculiarly* subject to the jurisdiction of the Ecclesiastical Courts; (i) and although the 53 G. 3, c. 127,

(c) Per Taunton, J. in *Birch v. Brown*, 1 Dowl. Pr. Rep. 395.

(d) *Post*, 486, 487.

(e) Oughton, 50; *Wyllie v. Mott*, 1 Hagg. Eccl. R. 28; *Rich v. Bushnell*, 4 Hagg. Eccl. Cas. 164; and see *Parham v. Templar*, 3 Phil. R. 223; a suit against a curate for altering a pew in the nave of the church, and certainly an unauthorised material alteration of a pew, may be the subject of a suit for perturbation, but a small alteration, not occasioning injury to any private right, may be made without a faculty, 3 Phil. Eccl. Cas. 525, 527; see *post*, 507, *Court of Faculty*.

(f) *Witcher v. Cheslam*, 1 Wils. 17; *Byerley v. Windus*, 5 B. & C. 1; 7 D. &

R. 564. But to sustain a prohibition the party applying must show by affidavit that he has a *prescriptive* right to the seat, *Stedman v. Hay*, Comyn's R. 368.

(g) *Cross v. Saller*, 3 T. R. 639.

(h) *Ante*, vol. i. 50, 51; and see many points, *Rich v. Bushnell*, 4 Hagg. Eccl. Cas. 164; *Kemp v. Wickes*, 3 Phil. Eccl. Cas. 264 to 306.

(i) 3 Bla. C. 92; 2 Ves. 451; 1 Atk. 289. The Court of Chancery will not be ancillary thereto, Chit. Eq. Dig. 591; Degge, 172; 4 Hagg. Eccl. Rep. 84; Burn's Eccl. L. and Burn's J. tit. Church Rates; see *Course of Proceeding for Subtraction of Church Rate*, *post*, 491, 492.

gives justices of the peace jurisdiction to enforce payment when the arrear of rates does not exceed 10*l.* yet at the same time it expressly enacts that the justices shall not proceed when the rate is in a course of litigation in the Ecclesiastical Court; and if for the first time it be *bona fide* insisted before justices that the liability to pay is *intended* to be disputed in that Court they cannot proceed further. (i) Some questions upon *church rates* are difficult and require great consideration. (k) There is much contradiction in the books upon this subject. The proper course when a rate is essential in order to repair the church, is for the churchwardens to call a vestry, and it is for the majority of the parishioners at such vestry to say whether they acquiesce in the rate proposed and what rate shall be assessed. (l) The right to tax themselves is vested *exclusively* in the majority and no Ecclesiastical Court can assess a *quantum*. (m) If the majority of the parishioners refuse to make a rate, still the churchwardens themselves cannot make one, and the solitary decision that they can is not law. (n) If the parishioners contumaciously, obstinately and pertinaciously refuse to make any rate at all when it is necessary, or will only make such a rate as is manifestly collusive, then they may be articted in the Ecclesiastical Court for such refusal and there punished; (o) but where a rate of 11*l.* was required, and the majority of parishioners would not assent to a rate for more than 50*l.* 17*s.* and two of the churchwardens exhibited articles against the two other churchwardens and ten parishioners, a decree rejecting the articles was affirmed with costs. (p) By the general law it seems that the duty to repair a *chancel* is not to fall upon parishioners (except in London), but by special custom, the parishioners elsewhere may be liable. (q)

After a rate has been made, the formal and strictly proper course is for the churchwardens to apply to the ordinary to *confirm* the rate; (r) but a rate is valid without confirma-

(i) 5 Maule & Selw. 248; but see *R. v. Wrottesley*, 1 B. & Adol. 648.

(k) See 4 Hagg. Eccl. Cas. 84 to 107; *Smith v. Keats*, 4 Hagg. R. 278; *Greenwood v. Greaves*, *id.* 77; *Lambert v. Weal*, *id.* 96, 102; *Watney v. Lambert*, *id.* 84.

(l) *Jeffrey's case*, 5 Coke, 66; *Prideaux*, 48; Bac. Ab. tit. Churchwardens, C.; *R. v. St. Margaret's, Westminster*, 4 M. & S. 250; *R. v. St. Peter's, Thetford*, 5 T. R. 364.

(m) *Rogers v. Davenant*, 1 Mod. 194, 236, neither on appeal nor otherwise; and see further in *Greenwood v. Greaves*, 4 Hagg. Eccl. Cas. 82.

(n) *Pierce v. Prowse*, 1 Salk. 166;

Groves v. Hornsey, 1 Hagg. Consist. Rep. 191; Bac. Ab. Churchwarden, C.; Burn's Eccl. Law, tit. Church, s. 6; see observations in *Greenwood v. Greaves*, 4 Hagg. Eccl. R. 83; overruling *Thursfield v. Jones*, 1 Ventris, 367, which is, however, copied into Degge, *Prideaux* and *Anderdon*.

(o) See authorities cited in *Greenwood v. Greaves*, 4 Hagg. Ecc. Cas. 80; and judgment of the Court, *id.* 82, 83.

(p) *Greenwood v. Greaves*, 4 Hagg. Ecc. Cas. 77.

(q) *The Bishop of Ely v. Gibbons*, 4 Hagg. Ecc. Cas. 156.

(r) Per Sir J. Nicholl in *Lee v. Culcraft*, 3 Phill. Ecc. Cas. 648.

CHAP. V.
SECT. X.

tion. (s) Sir John Nicholl observed, "if a rate-payer is dissatisfied with his assessment he should appear at the vestry and object to it; if his objections there are in vain his remedy is twofold, first, by entering a caveat against the confirmation of the rate, for in that case he becomes in the nature of a defendant, and the churchwardens are the parties applying for the confirmation; secondly, by refusing payment. In either case if he can make out that he has been over-assessed, he will be relieved. But one individual rate-payer not appearing at vestry to object to a rate being made, on the ground that it is for an *illegal purpose*, nor that the vestry has not been *legally called*, nor that the *assessment* has been unequally made, nor on any ground going to the invalidity of the *whole* rate, nor objecting that his own property is assessed above its true value, nor that of the whole sum to be raised by the rate he will have to pay more than his just proportion, cannot afterwards adopt proceedings to invalidate the *whole* rate; and Sir J. Nicholl observed, "Can one individual rate-payer thus lie by, and then come to this (the Arches) Court and pray that the whole rate may be quashed, because he offers to allege and shew that the value of the properties of a few individuals is greater in proportion to the assessments than the properties of other individuals? Even in a cause in the Ecclesiastical Court against a rate-payer of subtraction of rate, he ought to be confined to shewing either that the rate was illegally made, or that his assessment was too high and beyond his just proportion of the whole rate. (t) It was, therefore, decided that the Ecclesiastical Court has not jurisdiction upon an original proceeding by an individual rate-payer to set aside a rate on the ground of inequality in the assessment; the proper remedy for the party *unequally assessed* is to enter a *caveat* against the confirmation or to refuse payment of the rate, and thus compel the churchwardens to make him a defendant in a suit of subtraction of rate, upon which he may obtain a reduction. (u) This explains the object of the enactment in the 53 G. 3, c. 127, suspending the power of justices to levy a rate when it is bona fide to be contested in the Ecclesiastical Court. (x)

In a *suit of subtraction of church rate*, brought by the churchwardens against a parishioner, the presumption is in favour of the rate, and unless he establishes that he is unequally

(s) *Knight v. Gloyne*, 3 Add. 53; and per Sir J. Nicholl, 4 Hagg. Ecc. R. 290.

(t) Per Sir John Nicholl in *Watney v. Lambert*, 4 Hagg. Ecc. Cas. 87, 88.

(u) *Watney v. Lambert*, 4 Hagg. Ecc. Cas. 84.

(x) *Ante*, 472, 473; 5 M. & S. 248; *R. v. Wrottesley*, 1 B. & Adol. 648.

assessed, he will in general be condemned as well to pay the amount of the assessment as also the costs, and the resistance by a single individual of such rates are generally treated as vexatious, because they occasion great trouble and difficulty in a parish. (y)

Spiritual Courts also have jurisdiction over *grammar schools*, but in case of a libel for teaching school generally, without saying *what* school, the temporal Courts will grant a prohibition. (z)

Grammar schools.

The Ecclesiastical Courts have jurisdiction over *officers of an ecclesiastical nature* to compel them to perform their duty; and they have jurisdiction over all *offences* and injuries strictly of a *spiritual* nature. Thus the Spiritual Court may compel *churchwardens* to deliver their account, though they cannot decide on the propriety of the charges therein; and, therefore, if that Court should take any step against a churchwarden after he has delivered in his account, it would be an excess of jurisdiction, for which a prohibition would be granted, even after sentence. (a) So if a *clergyman* of the church of England refuse or neglect to perform the office of burying when he ought, (as for instance a deceased *dissenter*,) he may be suspended for three months by the ordinary, (b) or he may be punished in the temporal Courts by indictment or information, if any inconvenience to the public should arise from the neglect. (c)

Ecclesiastical officers, as churchwardens, ministers, &c.

The statute 5 Eliz. c. 23, s. 13, specifies some of the *ecclesiastical offences* punishable in the Spiritual Courts, and which are thereby required to be specified in the *significavit*, such as heresy, refusing to have a child baptized, or to receive the sacrament, or to attend divine service, or error in matter of religion, incontinency, usury, simony, perjury in the Ecclesiastical Court, or idolatry. So in Oughton's *Ordo Judicorum*, many of the offences punishable in the Spiritual Courts are enumerated, (d) as *perjury* in an ecclesiastical suit; and which, it seems, may be canonically punished for the good of the soul, as the judge may think fit; (e) but when the wilful mistatement constitutes perjury or false swearing, as in obtaining letters of administration, it is more usual to indict in the criminal Courts; or if se-

Ecclesiastical offences.

(y) *Lambert v. Wall*, 4 Hagg. Ecc. Cas. 102; where see several points as to the mode of rating; and see *Smith v. Keats*, *id.* 275, as to several points.

(z) *Cox's case*, 1 P. Wms. 29.

(a) *Leman v. Goulty*, 3 T. R. 3; *Catchside v. Ovington*, 3 Burr. 1922; *Nutkins v. Robinson*, Bunb. 247; *Snowden v. Herring*, *id.* 289.

(b) *Andrews v. Cawthorne*, Willes, 538; *Kemp v. Wickes*, 3 Phil. Ec. C. 264 to 306.

(c) *Id. ib.*; *ante*, vol. i. 50, 51.

(d) Oughton, translated by Law; Clerks' Assistant; Consett on Courts.

(e) Oughton, by Law, 42; Bac. Ab. Prohibition, L. 3; Jenk. 184; Keilw. 39, pl. 5.

CHAP. V.
SECT. X.

veral have been concerned, then for conspiracy. (f) *Simony* also, whether the offender be a clergyman or layman, may be prosecuted in the Ecclesiastical Court; and it is said that the Ecclesiastical Court is more severe in cases of simony than the statute law. (g) *Usury* also, when beyond ten per cent., may be prosecuted in these Courts. (h)

Brawling, &c.

So by 5 & 6 Ed. 6, c. 4, s. 1, if any person shall by words only *quarrel, chide or brawl* in any church or churchyard, it shall be lawful unto the ordinary of the place, on proof by two lawful witnesses, to suspend every *ecclesiastical* person so offending, and every *layman*, from the entrance of the church; and if he be a clerk, from the ministration of his office, so long as the ordinary shall think fit, usually six months. And these acts being offences cognizable by Spiritual Courts at common law, the party may be proceeded against, either under the statute or at common law; (i) and proceedings in the Ecclesiastical Court for smiting or laying hands, or for brawling, will not be stayed by prohibition. (k) If the proceeding be on the statute, there must be two witnesses; (l) if at common law, then only one. (m) The second section of the same act relates to *striking* in a church or churchyard. Of late, proceedings for brawling have, in consequence of vestry disputes, been disgracefully frequent. (n) The statute was intended rather to secure the sanctity and dignity of the place than the party assailed or abused; (o) and indecorous words and conduct towards the presiding minister, at a vestry meeting, is an ecclesiastical offence; (p) and as the object of the law is to prevent irreverend conduct, the circumstance of the other party having used

(f) As recently in the case of *R. v. Jacobs*, for conspiracy to obtain a license to marry by false swearing that the party was of age. And in *R. v. Pennell and another*, for a conspiracy, by false swearing, to obtain letters of administration and defraud the East India Company, A.D. 1834.

(g) Oughton, by Law, 44; *Wheeler v. Hesse*, 3 Hagg. 659, 696; 3 Phil. R. 171, 174.

(h) Oughton, by Law, 44; 1 Hagg. Consist. R. 465, in notes.

(i) *Wentworth v. Collins*, 2 Ld. Raym. 850; *Newbery v. Goodwin*, 1 Phil. Ec. C. 282; *Jenkins v. Barrett*, 1 Hagg. Ec. C. 15; but the libel must charge that the railing and sowing discord was in the church, Bac. Ab. Prohibition, L. 3.

(k) *Wilson v. Greaves*, 1 Burr. 240; *Ex parte Williams*, 4 B. & C. 513; 6 D.

& R. 373.

(l) *Hutchins v. Densiloe*, 1 Hagg. Cons. R. 181.

(m) *Ibid.*

(n) See instances, Burn's Ecc. L. tit. Church x., note 3; and the most recent ecclesiastical reports, *Car v. Goodhay*, 2 Hagg. Cons. R. 138; what is brawling, *Clenton v. Hatchard*, 1 Addams's R. 96; what not striking, 1 Hagg. Ec. C. 15.

(o) Oughton, by Law, 44; *North v. Dickson*, 1 Hagg. R. 730; *Jenkins v. Barrett*, *id.* 14; *Canning v. Sawkins*, 2 Phil. R. 293; *Daw v. Williams*, 2 Addams's R. 130, 136; *Williams v. Goodyer*, 2 Addams's R. 463; *Clinton v. Hatchard*, 1 Addams's R. 96; *Austen v. Dogger*, 3 Phil. R. 122.

(p) *Wilson v. M'Nath*, 3 Phil. R. 67, 89.

the most provoking language and conduct, affords no defence or excuse, for recrimination in this case is not tolerated. (q) In a suit for *Brawling*, under 5 & 6 Ed. 6, c. 4, s. 3, the words of brawling must be set forth in the articles, and the words "other enormous ecclesiastical offences," in a citation, are too general, and will not support a charge of smiting under that statute. (r) The sentence against a layman may be suspension *ab ingressu ecclesiæ* for a week, (s) or three weeks, (t) or a month, (u) or longer; with admonition and payment of costs generally, or 20*l.* or 35*l.*, or other fixed sum, usually less than the actual costs, *nomine expensarum*, (x) and a direction that the sentence shall be notified in church; (y) and in one case the sentence for smiting in a room, within the churchyard, was also *imprisonment* for twenty-four hours, (z) and it might be for any time not exceeding six months. (a)

Assaulting a clergyman is also an offence that may be proceeded for in the Ecclesiastical Court, and is punished by censure and costs, though not by the recovery of damages. (b) But the arresting a clergyman whilst performing or going to or returning from divine service, is now declared to be an indictable misdemeanor. (c)

The mother of a *bastard child* is punishable in these Courts, (d) and *adultery*, (e) *fornication*, (f) *lewdness*, *drunkenness*, (g)

(q) *Palmer v. Roffey*, 2 Addams's R. 141; *Palmer v. Sigmunt*, *id.* 196; *England v. Hurcomb*, *id.* 306; *Hutchins v. Denziloe*, 1 Hagg. Cons. R. 181; *Jarman v. Bagster*, 3 Hagg. Ec. C. 356; *North v. Dickson*, 1 Hagg. Ec. C. 730.

(r) *Jenkins v. Barrett*, 1 Hagg. Ec. C. 14.

(s) *Austen v. Dugger*, 3 Phil. Ec. C. 125.

(t) *Canning v. Sawkins*, 2 Phil. Ec. C. 293.

(u) *Field v. Cousens*, 3 Hagg. Ec. C. 178.

(x) *Jarman v. Bagster*, 3 Hagg. Ec. C. 360; *Jarman v. Wise*, *id.*

(y) *Canning v. Sawkins*, 2 Phil. Ec. C. 293.

(z) *Lee v. Mathews*, 3 Hagg. Ec. C. 169.

(a) See *post*, 484, n. (h); and 53 G. 3, c. 127, s. 3; *Hoil v. Scales*, 2 Hagg. Ec. C. 597; *Lee v. Mathews*, 3 Hagg. Ec. C. 169.

(b) Oughton, by Law, 44.

(c) 9 G. 4, c. 31, s. 23.

(d) 2 Atk. 673.

(e) In case of adultery the Temporal and Ecclesiastical Courts have concurrent jurisdiction, viz., an action at law, and

also ecclesiastical punishment; Cro. Car. 89; Cro. J. 538; Jones, 440; but where the party had been indicted for an *assault*, with intent to ravish, and convicted and fined, and then the husband brought trespass for assault and battery against him for the same offence, and which was pending; and then also libelled the party in the Ecclesiastical Court for *solicitation of chastity*, the King's Bench granted a prohibition, because as the attempt and solicitation to incontinence was coupled with force and violence, it became a *temporal crime in toto*, *Galisard v. Rigault*, 2 Salk. 552; 7 Mod. 79; 2 Ld. Raym. 809. Where there has been no violence, but unsuccessful *solicitation* of a wife, daughter or servant, a prosecution in the Ecclesiastical Court to compel the offender to perform penance seems a very proper proceeding.

(f) A clergyman may be suspended for three years for incontinency, *Watson v. Thorp*, 1 Phil. R. 269. A lewd woman, who has had a bastard, may be prosecuted in this Court, though under 7 Jac. 1, c. 4, she is to be sent to the house of correction, 7 Mod. 80.

(g) 1 Hagg. Cons. R. in note, 465.

CHAP. V.
SECT. X.

blasphemy and *absence* from Church, are all offences to be here prosecuted. (h) *Solicitation of chastity* may also be prosecuted in these Courts; though if a woman have previously indicted the party for an assault, with intent to ravish, and also sued him in an action of trespass vi et armis for assault and battery, it seems that such allegation of force, which is temporal, makes the whole cognizable by the temporal Courts; so that a prohibition against a proceeding in the Ecclesiastical Courts for the solicitation will issue; (i) and where solicitation of chastity has been successful, and followed by any temporal damage, as loss of service during the childbed to a master, or to a parent in the character of master, an action on the case for debauching the female, and consequent loss of service, has in effect abolished the remedy in the Ecclesiastical Courts. But where there has been a very culpable attempt to seduce, without conspiracy, between two or more persons, nor occasioning the loss of service, a suit in the Ecclesiastical Court for the solicitation is the only proceeding.

Limitation of
suits in Ecclesi-
astical Courts.

The 27 G. 3, c. 44, s. 1, we have seen requires suits in the Ecclesiastical Courts for defamatory words, to be commenced within six calendar months from the time they were spoken, and sect. 2, enacts that no suit shall be commenced in an Ecclesiastical Court for fornication or incontinence, or for striking or brawling in a church or churchyard, after eight calendar months. But a suit in the Ecclesiastical Court against a clergyman for incontinence, where the object is to obtain his suspension or deprivation, is not within that enactment, and therefore need not be commenced within the eight months. (k)

Circumstances
rendering it ex-
pedient to pre-
fer a proceeding
in the Eccle-
siastical Court.

In some respects a proceeding in the Ecclesiastical Courts is *preferable* to a Court of Law. Thus, although a party has been in custody more than a year, under a writ de contumace capiendo, in a suit in an Ecclesiastical Court for subtraction of tithes for less than 20*l.* and costs, he is not entitled to be discharged under 48 G. 3, c. 123, because he is not considered in prison under that act for a *debt* but for a *contempt*. (l)

When the Ec-
clesiastical
Courts have

When Ecclesiastical Courts have not Jurisdiction. The Ecclesiastical Courts have no jurisdiction over contracts or

(h) Oughton, by Law, 45.

(i) See *ante*, 477, note (e); *Galizard v. Rigault*, 2 *Ld. Raym.* 809; *Gibs.* 1085; but see 1 *Salk.* 382; 2 *Burn's Ecc. L. tit. Lewdness*, 404.

(k) *Ante*, vol. i. 783; *Free v. Bur-*

goyne, 1 *Dow's Rep. N. S.* 115; 5 *Bar. & Cres.* 400; 8 *Dowl. & Ry.* 179; months in the Ecclesiastical Law and matters are always calendar; *Bac. Ab. Prohibition*, L.

(l) *Ex parte Kaye*, 1 *B. & Adolp.* 652

trespasses, as for breaking open a chest in a church, and taking away the title-deeds of the advowson; (n) and where a parson libelled the defendant in a Spiritual Court, for cutting elms in the church-yard and breaking a church wall, a prohibition was issued on a suggestion that the trees grew on the freehold of the parson: (o) and the ordinary cannot punish a trespass committed even in the body of the church, unless it hinder divine service. (p) Nor has a Spiritual Court any jurisdiction over *trusts* (if still subsisting); and therefore where a party, sued as a trustee, was arrested on a writ de contumace capiendo, the Court of King's Bench, on habeas corpus, discharged him out of custody. (q) And although this Court may compel a churchwarden, (r) or an executor, (s) to deliver his accounts, yet after the same, or an inventory by an executor, has been delivered, this Court cannot proceed to impeach the account. So a suit for defamation cannot be instituted in the Spiritual Court for a *written libel*, because any *written* slander of a person is actionable or indictable. (t) So these Courts have no jurisdiction over a devise of *real* property, or of a legacy or charge thereon. (u) Nor on the strict question of a right of way to remove tithe, though perhaps, collaterally, such a right might be tried. (x) But the rector, to avoid the necessity for such a suit, may remove the obstruction, (y) or may proceed in a temporal Court. (z) And although the Spiritual Court has in some cases jurisdiction over grammar schools, yet in case of a libel for teaching in a school generally, without license, and without showing what school, the temporal Courts will grant a prohibition. (a) And there is not any maxim in the law better established than that the Ecclesiastical Court has no jurisdiction in cases of treason or felony, or other of-

not jurisdiction (m) either as respects the original suit or some matter afterwards arising.

(m) See in general Com. Dig. Prohibition, G.; Bac. Ab. Courts Ecclesiastical; Burn's Ecc. Law, tit. Courts; and see Harrison's Index, tit. Inferior Court, II. Prohibition.

(n) Fitz, N. B. 40; 4 T. R. 351; nor to try parish boundaries, because it involves prescription, Cro. Eliz. 228.

(o) Ld. Raym. 212; *Binstead v. Collins*, Bunb. 229.

(p) *Binstead v. Collins*, Bunb. 229.

(q) *R. v. Jenkins*, 1 Bar. & Cres. 655; 3 Dowl. & Ry. 41, S. C.; 1 Atkyn, 491; and see fully *Grignion v. Grignion*, 1 Hagg. R. 535.

(r) *Leman v. Goulty*, 3 T. R. 3; Bun. 247, 289.

(s) *Catchside v. Ovington*, 3 Burr. 1922; *Henderson v. French*, 5 M. & S. 406.

(t) *Ante*, 469; *Anon. Comb.* 71; Bac. Ab. Courts, Ecc. D. and. tit. Prohibition, 3; Harrison's Index, tit. Inferior Court, II. Prohibition, 2.

(u) *Barker v. May*, 9 Bar. & Cres. 489; Bac. Ab. Prohibition, L. 2.

(x) *Burnell v. Jenkins*, 2 Phill. Rep. 398, 399; March. Rep. 45; Bulst. 67; Jones, 230; Bac. Ab. Prohibition, L.

(y) *Id.*; 2 Phill. Rep. 401.

(z) *Cobb v. Selby*, 2 New Rep. 466.

(a) *Cox's case*, 1 P. Wms. 29, Canon 77th; 2 Phill. Rep. 202, note (b); see fully Burn's Ecc. Law, tit. Schools; *ante*, 475.

CHAP. V.
SECT. X.

fence cognizable or punishable in the temporal Courts; (b) nor can *damages* be recovered in the Ecclesiastical Courts, but *costs* only. (c) Nor has the Ecclesiastical Court jurisdiction over cursing and swearing, nor over defamation, calling a person a common swearer. (d) Nor can these Courts try the existence of a *custom* or *modus*; and if they attempt to proceed in a cause where the *existence* of a *custom* or *prescription*, or of a *deed* is in issue, a prohibition from the Superior Court issues. (e) The *reason* is, that a judge and jury, proceeding according to the course of the common law, is a more competent tribunal for the trial of such questions of facts depending on prescription or custom, or the valid execution of a deed; and the circumstance of such a question arising between two ecclesiastical persons makes no difference, for even then the question must be determined at law, or a prohibition might issue; (e) but if the matter at issue be the existence of a mere ecclesiastical matter, and not a temporal right, as for instance, an *ecclesiastical* custom, then the question ought to be tried in the Spiritual Court, because fifty years (instead of sixty in Courts of law) make a custom by the ecclesiastical law, and therefore if the Courts of law were to judge of such a custom, they would be governed by a wrong rule. So, where the *right* to tithes is admitted, and the only question is, whether they are to be paid to the rector or the vicar, that question may be tried in the Spiritual Court, which is the reason that the common law Courts will not then grant a prohibition, and not as absurdly supposed by some, because both parties are ecclesiastics. (f) And although where a Spiritual Court hath jurisdiction of the principal cause, they may determine the accessory, they must, in so doing, proceed according to the rules of the common law, and therefore cannot legally require two wit-

(b) Examen of the Scheme of Chan. Pr. 90; and see Burn's Ecc. Law, tit. Courts, 50, note (m). But after conviction in a temporal Court the party may be proceeded against also in the Spiritual Court, if a spiritual person, in order to *deprive him*, though not for ecclesiastical punishment, Bac. Ab. Prohibition, L. 3; 2 Ld. Raym. 1506; and this even after six calendar months have expired, *Free v. Burgoyna*, 5 B. & Cres. 400; 8 D. & R. 179. The libel in such case is not to charge directly that the party was guilty of the offence, but merely that he had been *convicted*, &c. *ibid*.

(c) Watson, c. 30; 2 Burn's Ecc.

Law, tit. Courts, 50, 51.

(d) *Harris v. Butler*, Arches Court, 1 Dec. 1798; 1 Hagg. Consist. Court, Rep. 463, note †.

(e) *Vanacre v. Spleen*, Carth. 33; *Anon.* 1 Vent. 274; *Anderson v. Davenport*, 3 Salk. 86; *Cheesman v. Hoby*, Willes, 680; Com. Dig. Prohibition; Burn's Ecc. Law, Prohibition. In *Johnson v. Oldham*, 1 Ld. Raym. 609; 12 Mod. 416, S. C., Lord Holt states the reason to be because Spiritual Courts have different rules respecting customs than the Temporal Courts.

(f) Per Willes, C. J. in *Cheesman v. Hoby*, Willes, 680; and see 3 Bla. Com. 89.

nesses, and if they do, a prohibition may be issued. (g) And an apparator, proctor, &c. cannot sue in the Spiritual Court for his fees. (h) Nor has an ecclesiastical judge any jurisdiction to compel a father to defend a suit there as guardian to his son, and where he assumed such jurisdiction and excommunicated the father for his refusal, it was decided at nisi prius by Lord Ellenborough, that an action on the case was sustainable against the judge for such his illegal excommunication. (i)

But a question of jurisdiction ought not to be raised on a mere *motion*. (j) The rule seems to be, that "if it be clear that the Ecclesiastical Court has no jurisdiction, then the Court would itself stop without waiting for an injunction or prohibition, but if the point be at all doubtful, the Court would be bound to proceed; for to refuse the exercise of a jurisdiction which is competent to entertain the suit, and to which a party applies, would be a sort of denial of justice." (j)

Causes or suits which may be instituted in the Ecclesiastical Courts in respect of the different course of proceeding in each, are termed plenary or summary. *Plenary*, full or formal suits, are those in which the proceedings must be full and in formal order, (l) whilst the very term summary signifies that then the proceedings are less formal and more succinct. (m) When there is any doubt, the safest course is to proceed as in a plenary cause, for if the proceeding be improperly summary it would be void. (n)

Course of proceeding in the Ecclesiastical Courts in general. (k)

The complaints that must be formally instituted and prosecuted, termed *plenary causes*, are the following: (o) —

1. All Testamentary Proceedings and businesses of Administration, unless in the Prerogative Court, where the proceedings are always summary, as by motion or petition.

2. All causes of Legacy.

(g) 12 Coke, 65; Hob. 188, 247; *Marriot v. Marriot*, 1 P. Wms. 12; 1 Stra. 672, S. C.; *Freeman v. Shotter*, 3 Salk. 288; Bac. Ab. Prohibition, L. 5.

(h) *Pearson v. Campion*, 2 Dougl. 629. See several cases and qualifications Bac. Ab. Prohibition, L. 1.

(i) *Beaurain v. Scott*, 3 Campb. 388.

(j) Per Sir John Nicholl in *Grignion v. Grignion*, 1 Hagg. R. 536.

(k) 2 Burn's Ec. L. tit. Courts, 48. In general old rules of practice consonant to reason and analogy, and not authoritatively altered, ought to continue to govern, *Durant v. Durant*, 1 Addam's R. 118, 123.

(l) Speaking of the then Ecclesiastical Courts, Bishop Burnett observes, "they have very little business, but they contrive to make the most thereof withall by introducing long recitals and otherwise, hence called *plenary*."

(m) Law's Oughton, 41, 42. So in Courts of Law and Equity the proceedings are by formal suit, or by a summary motion, as against their officers for gross professional misconduct, or to set aside warrants of attorney, annuity deeds, &c.

(n) *Id.* 60.

(o) *Ordo Judicorum*, Oughton, 59 to 61.

CHAP. V.
SECT. X.

3. Causes of Defamation, or reproachful or opprobrious Language.

4. Causes of Divorce, or Separation from Bed and Board;
or

5. Jactitation of Marriage.

6. Impediments to Marriage.

7. Suits for Ecclesiastical Dilapidations.

8. Suits relating to Seats or Sitting-places in Churches ; and

9. Suits for Tithes.

The practice in the principal of these suits will be hereafter fully considered, we are here principally examining the *extent of jurisdiction*.

Parties.

The suit may sometimes, even of necessity, be in the name of a married woman *alone*,^(o) as either for words defaming her,^(o) or for a legacy bequeathed to her for her separate use.^(p)

Process.

The *process* in the Ecclesiastical Courts is by *citation*, which differs from process in the Temporal or Equity Courts, and being for the enforcement of a moral or religious duty, may on that account be served on a Sunday.^(q)

Libel.

Instead of the declaration at common law or bill in equity, the statement of the complaint is termed a *libel*, and may, it is said, be less certain than a declaration at common law,^(r) but, on the other hand, it may in effect be more comprehensive ; as in a suit for slander it is proper first to state the particular defamatory words, and then general words of reproach, and the complainant may recover in respect of the latter, though he fail as to the former.^(s) But in criminal suits, as in articles to be administered to a clergyman for the reformation of his manners and excesses, and more especially for adultery, fornication or incontinency, the articles must be so specific as to afford a fair opportunity of defence.^(t)

Answer.

The *plea* in this Court may be called the *answer*, and in which the defendant denies or extenuates,^(u) and if the suit be for slander, as calling a woman a whore, the defendant *may justify* that the words were true.^(x)

^(o) 3 Salk. 288 ; 5 Mod. 69 ; Salk. 115 ; Ld. Raym. 73 ; 12 Mod. 891. And her husband cannot obtain a prohibition, *Tarrant v. Maur*, 1 Stra. 576. After sentence of divorce the husband cannot release costs recovered by wife against a third person, Ld. Raym. 74.

^(p) *Capel v. Roberts*, 3 Hagg. Ec. R. 161, in note.

^(q) 5 Mod. 449 ; Carth. 504 ; Ld.

Raym. 706 ; 12 Mod. 275 ; 29 Car. 2, c. 7 ; 2 Burn's Ec. Law, tit. Courts, 48.

^(r) 2 Rol. Ab. 298.

^(s) Law's Oughton, 46, 47 ; see form of libel, *post*, 487, n.

^(t) *Oliver v. Hobart*, 1 Hagg. Ec. Cas. 43.

^(u) 3 Bla. Com. 100.

^(x) *Ante*, 470.

If the defendant deny the charge, the complainant proceeds to proofs by *witnesses*, whose testimony is taken down in writing by an officer of the Court.^(y) In an action for defamation and many other cases in the Ecclesiastical Court, the words must be *proved* by *two* witnesses, but they need not both swear to precisely the same words, or spoken at the same time.^(z) The general principle upon which two witnesses have been required in the Ecclesiastical Court has been, that in regard to the commission of a crime the presumption in favour of innocence is considered as nearly equal to the oath of one witness, and that, therefore, to turn the scale against the party accused, there ought to be two witnesses to establish the charge. But the difficulties occasioned by this rule induced a modification in practice, and the consideration that one witness to the fact, and another to collateral corroborating circumstances, ought to be deemed sufficient, unless in cases where a statute requires the proof of the *same* fact by *two* witnesses.^(a)

Witnesses.

As regards the sentence or judgment, an Ecclesiastical Court has no jurisdiction to award *damages*, but the punishment is only by enjoining the performance of *penance* and payment of costs, either generally or a named sum, or, as in a suit for restitution of conjugal rights, "*performance*" of the enjoined duty, and they cannot either fine or amerce.^(b) But the penance enjoined in a *private* suit may be commuted or dispensed with for money paid to the complainant.^(c)

Sentence.

The 53 G. 3, c. 127, in amelioration and aid of this otherwise imperfect jurisdiction, and in order the better to enforce observance of the sentence in cases of *private* injuries and *some smaller offences*, prohibits sentences of *excommunication* and writs of *excommunicatio capiendo*, but gives a new process, being an execution at law, called a writ *de contumace capiendo*, which, provided the sentence and proceedings be regular, in case of *continued disobedience*, operates as a perpetual imprisonment,^(d) and the confinement under that writ is considered in the nature of an imprisonment for a *contempt*, and not for a *debt*; on which account, although the sum sentenced to be paid be under £20, and the party has been imprisoned upwards of a year, he is not entitled to his discharge under 48 G. 3, c. 123;^(e)

(y) 3 Bla. Com. 100.

(z) 3 Bla. Com. 87, 88; *Cole v. Corder*, 2 Phil. R. 106; *Crompton v. Butler*, 1 Hagg. Cons. R. 463.

(a) See observations in *Crompton v. Butler*, 1 Hagg. Cons. R. 461; and *Hutchins v. Denziloe*, *id.* 182.

(b) 11 Coke, 44 a; 5 Mod. 70; Hale's

Hist. C. L. 33.

(c) 5 Mod. 70.

(d) In a suit for brawling, sentence of imprisonment for seven days and payment of costs, *Hoiles v. Scales*, 2 Hagg. 597; and even six months' imprisonment, 53 G. 3, c. 127, s. 3.

(e) *Ex parte Kaye*, 1 B. & Adol. 652.

CHAP. V.
SECT. X.

and if the party be already in custody of the marshal, he may be charged in such custody with the writ *de contumace capi-endo*. (f) However, a person imprisoned under a writ of *ex-communicato capiendo*, or, as it should seem, *contumace capi-endo*, is entitled to the benefit of the rules of the King's Bench prison. (g) In a suit for brawling and smiting in a church or church-yard, there may be sentence of *imprisonment*, as for seven days, or not exceeding six months, with payment of costs. (h)

The *sentence* of an Ecclesiastical Court, if of a novel kind, ought not to issue without either the Court or a judge being consulted in *camera*, or moved in Court by counsel, because it is of consequence that the instruments of the Court should be strictly correct, they being generally presumed to be declaratory of the law of the Court. (i)

In case of *nonconformity* to the sentence of the Ecclesiastical Court, as upon a decree against a wife of restitution of conjugal rights, if the defendant disobey, she may be imprisoned under the statute 53 G. 3, c. 127, for the contempt at the instance of the complainant; and such imprisonment is not, as has been supposed, in the discretion or terminable at the pleasure of the ecclesiastical judge by whom the party has been pronounced in contempt, but at most he has jurisdiction, according to the facts, to release, on its being established that the party *has obeyed* the original sentence; (k) and without such *obedience*, the Court cannot, upon petition or otherwise, relieve from the imprisonment. (k) But we have seen that the imprisonment might be modified by removal into the prison of the Court of King's Bench, and then obtaining the benefit of the rules. (l)

But in the proceedings under the statute 53 G. 3. c. 127, it must clearly appear that the Ecclesiastical Court had jurisdiction, and that the form of proceedings has been duly observed; (m) and if such proceedings should be set aside, a new

(f) Per Bailey, 9 B. & C. 67.

(g) *Id. ibid.*; and *Rex v. Bricklas*, 1 Stra. 413. Consequently if a party be imprisoned in such a case in a county prison, he might be removed into the King's Bench prison, and then obtain the benefit of the rules.

(h) *Hoile v. Scales*, 2 Hagg. Ec. Cas. 597; 53 G. 3, c. 127, s. 3; *Lee v. Matthews*, 3 Hagg. 169; *Field v. Cousens*, *id.* 178; *Jarman v. Bagster*, *id.* 356; *Jarman v. Wise*, *id.* 360.

(i) Per Sir John Nicholl in *Elliott and Sugden v. Garr*, 2 Phil. R. 18.

(k) *Barlee v. Barlee*, 1 Addams, R. 301.

In this case the wife afterwards indicted the husband and others for a conspiracy, but at Chelmsford assizes they were acquitted, the jury being satisfied that she was insane. See *supra* note (g), relative to obtaining the rules.

(l) *Supra*, n. (g).

(m) 5 B. & Ald. 791; 3 Dowl. & R. 57; *Austen v. Dagger*, 1 Add. R. 307; and MS. *Ex parte Mrs. Barlee*, K. B. Mich. T. 1824, cor. Bayley, Holroyd, and Littledale, J.'s, on the hearing of a rule at the house of Bayley, J. in Dec. 1824,

motion for the former costs may issue, (n) and the sentence must not be in general terms to do the "*usual penance*," however well its limits may be understood in the Ecclesiastical Court, but it must specify *what particular penance* shall be done, and for that defect in the sentence the party was discharged; (o) and where the warrant issued in pursuance of the writ de contumacē capiendo stated, that the defendant was attached for non-payment of costs in a cause of appeal and complaint of nullity, lately depending in the Arches Court of Canterbury, it was held insufficient, in not stating with certainty the nature of the cause, so as to show it was sufficiently within ecclesiastical jurisdiction (p). But where it appeared in the significavit that the defendant was condemned in a cause of defamation and slander *merely spiritual*, this was holden sufficient. (q)

The course of practice of an Ecclesiastical Court is matter of fact to be proved by evidence; (r) or a certiorari may be issued to the judge of an inferior jurisdiction to return the practice of his Court. (s)

We have seen that in matrimonial causes a suit originally professing to have only one particular object may afterwards quite change that object; thus, a suit for jactitation of marriage may change and conclude with a sentence in favour of the defendant, of restitution of conjugal rights; and, on the other hand, a suit for restitution of conjugal rights may terminate in a decree of divorce, on account of the adultery of the complainant. (t).

There are some suits of more frequent occurrence in the Ecclesiastical Courts, the particular proceedings in which it is essential for all practitioners to be acquainted with, and which having been very attentively considered by one of the most eminent proctors practising in the Spiritual Courts, are here stated with the utmost confidence. These relate to suits for defamation—restitution of conjugal rights—nullity of marriage—divorce—subtraction of tithes and subtraction of church

The practical proceedings in certain suits of usual occurrence.

upon which Mrs. Barlee was discharged from imprisonment on sentence in a suit for restitution of conjugal rights. See other cases, Chitty's Col. Stat. 245 to 251, in notes.

(n) *Austen v. Dagger*, 1 Add. 307.

(o) *R. v. Maby*, 3 Dowl. & R. 570; Oughton, 304. The form of sentence on a decree of incestuous marriage, see 2

Phil. Rep. 362, note 6.

(p) *R. v. Dagger*, 5 B. & Ald. 790; 1 Dowl. & R. 460.

(q) *R. v. Payton*, 7 T. R. 153.

(r) *Beaurain v. Scott*, 3 Campb. 388.

(s) *Williams v. Bagot*, 4 Dowl. & R. 315.

(t) *Ante*, 461.

CHAP. V.
SECT. X.

rates—the law relating to each of which we have already in a great measure considered.

Proceedings in
a suit for de-
famatory words.

The course to be adopted in instituting a suit for *Defamation* is, for the party complaining of the grievance to obtain a citation against the person speaking the offensive words. Upon the return of this citation into Court, after personal service on the defendant, and on appearance being given, a libel pleading the facts when, where, and by whom the words were spoken, and the jurisdiction of the Court, is given into Court, and upon its admission the defendant is called upon to give an affirmative or negative issue thereto. Should the words be admitted, that is, an affirmative issue be given, the defendant is enjoined to perform penance, and extract a certificate shewing that the sentence of the judge has been complied with. If however the defendant denies the truth of the averment in the libel, witnesses are examined in support of the facts pleaded, and in the event of no responsive plea being given by the defendant, (which he is at liberty to do,) publication of the evidence is decreed. An allegation, excepting to the credit or testimony of a witness or witnesses, if advisable, can be tendered, and the judge will admit the same, if the facts are sufficiently stringent, and the evidence of the witness excepted to forms a material part in support of the case; should this however be declined, the judge proceeds to hear the cause and pronounce sentence; presuming it to be in favour of the plaintiff, the defendant is enjoined to perform the penance, the same as if an affirmative issue had been given upon the admission of the libel. The forms of citation and libel in such a suit are stated in the note. (u).

Form of citation
in a suit for de-
famation.

(u) Y. Z. [*the name of the bishop,*] by divine permission, Bishop of London, to all and singular clerks and literate persons, whomsoever and wheresoever, in and throughout our whole diocese of London, greeting: We do hereby authorize, empower, and strictly enjoin and command you, jointly and severally, peremptorily to cite or cause to be cited C. D. of the parish of ———, in the county of Middlesex and diocese of London, to appear before the worshipful ———, doctor of laws, vicar-general and official principal of our Consistorial and Episcopal Court of London, lawfully constituted his surrogate, or some other competent judge in this behalf, in the common hall of Doctors' Commons, situate in the parish of St. Benedict, near Paul's Wharf, London, and place of judicature there, on the third day after he shall be personally served with this citation, if it be a Court day, otherwise on the Court day then next following, at the usual and accustomed hours for hearing causes and doing justice there, then and there to answer to A. B. of ——— in the parish of ———, in the county and diocese aforesaid, in a certain cause of defamation, and further to do and receive as unto law and justice shall appertain, under pain of the law and contempt thereof, at the promotion of the said ———, and whatsoever you shall do or cause to be done in the premises you shall duly certify our vicar-general and official principal aforesaid, his surrogate, or some other competent judge in this behalf, together with these presents. Dated at London, the ——— day of ———, in the year of our Lord ———, and in the ——— year of our translation.

In a suit *for restitution of conjugal rights* a citation issues under the seal of the Ecclesiastical Court claiming jurisdiction, or a *decree* (by letters of request) from the Arches Court at the suit of the plaintiff, calling upon the defendant *to render conjugal rights*. Upon a personal service having been effected and the citation returned, and an *appearance* given, a *libel* is brought into Court, pleading that the parties being free from matrimonial engagements, *A. B.* paid his court in the way of marriage to *C. D.*; the marriage, when, where, and the entry

Proceedings in
a suit for resti-
tution of conju-
gal rights.

In the name of God, Amen. Before you the worshipful ———, doctor of laws, vicar-general of the Right Reverend Father in God ———, by divine permission, Lord Bishop of London and official principal of the Consistorial and Episcopal Court of London, lawfully constituted your surrogate, or any other competent judge in this behalf, the proctor of ———, of ———, in the parish of ———, in the county of Middlesex, and diocese of London, against ———, of the parish of ———, in the county and diocese aforesaid, and against any other person or persons lawfully intervening or appearing for him in judgment before you by way of complaint, and hereby complaining unto you in this behalf doth say, allege, and in law articulately propound as follows, to wit—

Form of libel in
Consistory
Court of Bishop
of London, in a
suit for defa-
matory words.

First,—That all and every person or persons who utter, publish, assert, or report, or shall have uttered, published, asserted, or reported reproachful, scandalous, or defamatory words, to the reproach, hurt, or diminution of the good name, fame, and reputation of any other persons, contrary to good manners and the bond of charity, are, and ought to be monished, constrained, and compelled to the reclaiming and retracting such reproachful, scandalous, and defamatory words, and to the restoring of the good name, fame, and reputation of the person thereby injured, and that for the future they refrain from uttering, publishing, and asserting or declaring any such reproachful, scandalous or defamatory words, and are and ought to be canonically corrected and punished; and this was and is true, public, and notorious.

Second,—That notwithstanding the premises mentioned in the next preceding article, the said ——— in the months of ———, ———, last past, or in some or one of those months, within the said parish of ———, in the county and diocese aforesaid, or in some other parish or public place in the neighbourhood thereof, or near thereunto, and within six calendar months from the commencement of this suit, in an angry and reproachful and invidious manner, several times, or at least once, in the presence and hearing of divers credible witnesses, did defame the said ———, who was and is a person of good reputation and character, and charged the said ——— with having committed the crime of fornication or incontinency, and speaking of and meaning and intending the said ———, the party agent in this cause, said, affirmed, and published several times, or at least once, these or the like words, to wit, ———, with many other defamatory words of the like nature, purport or effect, and the party proponent doth allege and propound every thing in this article contained jointly and severally.

Third,—That the said ——— hath oftentimes, or at least once since the affirming and speaking the defamatory and scandalous words mentioned in the next preceding article of this libel, owned and confessed that he spoke the said defamatory words as in the said next preceding article are set forth, and the party proponent doth allege and propound as before.

Fourth,—That by reason of speaking the said defamatory and scandalous words, the good name, fame, and reputation of the said ——— is very much hurt and injured amongst her neighbours, friends, acquaintance and others, and this was and is true, public, and notorious, and the party proponent doth allege and propound as before.

Fifth,—That the said ——— was and is of the parish of ———, in the county of Middlesex, and diocese of London, and therefore and by reason of the premises was and is subject to the jurisdiction of this Court, and the party proponent doth allege and propound as before.

Sixth,—That the said ———, the party agent in this cause, hath rightly and duly complained of the premises to you the vicar-general of the Right Reverend Father in God Charles James, by divine permission, Lord Bishop of London, and official principal of the Consistorial and Episcopal Court of London aforesaid, and to this Court, and the party proponent doth allege and propound as before.

Seventh,—That all and singular the premises were and are true, and so forth.

CHAP. V.
SECT. X.

thereof in the register book of the parish wherein they were married, a copy of which entry is annexed to the libel; the living and cohabiting together and passing as man and wife, and birth of children (if any); the ceasing and refusal of one of the parties to cohabit, and the jurisdiction of the Court; and concludes by praying that the marriage may be pronounced for, and the party offending render conjugal rights. The defendant as a *bar* may, by *responsive allegation*, plead cruelty or adultery (if the facts are so), and if either be established, the suit may, as we have seen, terminate in a decree of divorce. (x) But if no such answer be advanced, then, after the libel has been admitted, the defendant is required to give an answer thereto; should it be in the *affirmative*, the party offending is admonished and directed by the judge to render conjugal rights; should the answer however be in the negative, witnesses are examined, and upon publication of the evidence, and no allegation excepting to the testimony of any of them be given, the judge hears the cause and passes sentence; and, presuming such sentence to be favourable to the complaining party, he directs the defendant to render conjugal rights, and decrees a monition to issue to that effect; and if the defendant, after personal service of such monition, treat the order of the Court with contempt or neglect to conform, the judge, upon notice having been given to the defendant, will pronounce him contumacious, and direct such contempt to be *signified*; upon which, a writ *de contumace capiendo* for taking the defendant into custody issues from the Court of Chancery.

The *formal* part of the *citation* in this case is similar to the citation for defamation, and, in fact, in all cases it may be said to be the same, differing only in the facts of the grievance complained of.

Proceedings in
a suit for nullity
of marriage by
reason of undue
publication of
banns.

The proceedings against a party for *nullity of marriage* in consequence of undue publication of banns, are personally to serve a *decree* upon the defendant in the suit, and upon its return into Court a libel is given, and on its admission the defendant is called upon to give in an answer affirmative or negative; if the latter, witnesses are examined and the cause proceeds through its various stages until a definitive sentence be given.

The *libel* in this case pleads (or in other words recites) so much of the act of the 4 G. 4, as applies; the birth and baptism of the parties, and exhibits annexed to the libel, baptismal certificates; the courtship and marriage, *and of its being concerted be-*

tween the parties that the banns should be published in fictitious names, and that they were not baptized by such names, or known by them; the entry in the parish books of the publication of the banns and the identity of the parties, and a certificate of this entry is annexed to the libel, which also pleads the marriage of the parties in such assumed names and annexes a copy of the certificate of marriage, and that the signature to the original entry is in the handwriting of the parties; that the complaint is just, and the Court has jurisdiction to entertain the suit.

Suits for nullity of marriage by reason of incest are usually promoted at the instance of a party by virtue of the office of the judge, upon the party promovent entering into a bond to pay such costs and charges as the judge or his surrogate should allot in case of failure. A decree in this case is personally served, charging the defendant with being guilty of the foul crime of incest; upon the return of this decree and an appearance being given, or in event of nonappearance, a further decree, calling upon defendant to see proceedings is served, and if no notice be taken the suit proceeds, and articles are exhibited and admitted, pleading the marriage and cohabitation of the father and mother of *A. B.* and *C. D.* and annexes the certificate of such marriage, the birth and consanguinity or affinity of *A. B.* and *C. D.*, when and where they were baptized, annexes a copy of the certificate of such baptism, and further pleads the identity of the parties, the marriage of defendant with *A. B.*, living and cohabiting as man and wife and a copy of the certificate of marriage and identity, the death of *A. B.* and subsequently marrying *C. D.*, the marriage certificate, identity of parties, the committing of incest, jurisdiction of the Court, and prays that the judge do pronounce the marriage null and void, and that the defendant should be corrected.

Proceedings in a suit for nullity of marriage by reason of incest.

A *citation or decree* issues at the suit of the party complaining, calling upon the defendant to appear and shew cause why the plaintiff should not be divorced *from bed, board, and mutual cohabitation, by reason of cruelty or adultery*, as the case may be. The *service* of the process being effected and an *appearance* being given, a *libel* is brought in, and on its admission by the judge and the averments being denied by the defendant, *witnesses* are examined and publication of their evidences, and if there be no allegation excepting to them or any of their testimony the judge proceeds to *hear the cause* and give sentence. During the proceedings, the defendant can give in a *responsive allegation* recriminatory, and presuming both parties be proved to have been guilty of adultery the judge will dismiss the suit.

Proceedings in a suit for a divorce by reason of cruelty or adultery.

CHAP. V.
SECT. X.

Alimony is frequently directed to be paid to the wife during the dependence of the suit, and in order to determine the amount, an allegation of faculties, pleading the value of the husband's property and his annual income, and his answers on oath thereto, are given, and the judge then allots alimony, according to the facts to be gleaned from the plea and answer respecting the circumstances and means and situation in life of the parties.

The *libel* in this case pleads the courtship and marriage of the parties, their cohabiting and passing as man and wife, the birth of children (if any), the various acts of *adultery*, when, where, and with whom committed, or if *cruelty*, specifying the same and when and where; and also shews the jurisdiction of the Court, and concludes by praying the judge to pronounce the party to be divorced from bed, board, and mutual cohabitation.

In cases where proceedings have been previously had at common law and a judgment obtained against an adulterer, that fact is pleaded and a certified copy of the judgment is annexed.

Proceedings in
a suit for sub-
traction of
Tithes.

The *citation* in a suit for subtraction of *Tithe* issues at the instance of the party entitled to the tithes, calling upon the defendant to appear in a cause of subtraction of tithes; and upon personal service thereof, and an appearance being given, a *libel* in the subscribed form, with a schedule, is brought in; the latter very fully and specifically sets forth the various titheable articles belonging to the defendant. The proceedings are in this, similar to those in a cause of subtraction of church-rate in the next page.

Appeal therein
from diocesan to
Arches Court.

Presuming a cause of this kind to commence in a diocesan Court, and either party feel aggrieved at the mode of proceeding or decision given, the party complaining may *appeal to the Court of Arches*, upon which an *inhibition*, under the seal of the superior Court, is served upon the registrar of the Court below, and also on the opposite party, or his proctor. A *monition* also issues from the higher Court for the transmission of the various papers and proceedings given in and had in the lower Court. These documents, after the service has been effected, are *returned* into the Court of Arches, and upon an appearance being given for the respondent, a *libel of appeal* is given, which states when and before whom the suit was originally depending, complains of the grievance suffered by the appellant, of his having appealed to the higher tribunal, and the jurisdiction of the Court, and concludes by praying the judge to pronounce for the appeal. On the admission of this libel the respondent gives a negative issue thereto; and the process and all proceedings, &c. had in the Court below, being brought in, the judge

decrees publication of the evidence and proceeds to pronounce sentence. Should this be in favour of the appellant he retains the cause in the Arches Court until a final adjudication; if, however, he decides in favour of the respondent, the cause is remitted to the Court below, which again proceeds therein. The form of *citation and libel* in a suit of this nature will be found in the note.(x)

CHAP. V.
SECT. X.

A citation issues at the suit of the churchwardens, calling upon the defendant to appear in a cause of subtraction of

Proceedings in a suit for subtraction of Church-Rate.

(x) A. B. Clerk, Master of Arts, Official Principal of the Episcopal Court of Exeter, lawfully constituted, To all and singular clerks and literate persons lawfully appointed within the diocese of Exeter, greeting: We hereby charge and command you jointly and severally to cite, or cause to be cited, A. B. of —, in the county of — and diocese aforesaid, that he appear before us or our lawful surrogate, in the cathedral church of Saint Peter in Exeter in the Consistorial Court and place of judicature there, on — the — day of —, at the usual hour of hearing causes there, then and there to answer to the Reverend —, clerk, rector of the rectory and parish church of — aforesaid, in a cause of subtraction of tithes, and further to do and receive as unto law and justice shall appertain: And what you shall do herein you shall duly certify us at the time and place aforesaid, together with these presents. Given under seal of our office the — day of —, in the year of our lord.

Form of *citation* in a suit for subtraction of tithes at instance of rector in Consistorial Court of Exeter.

A. B. Actuary assd.

In the name of God, Amen. Before you the worshipful George Martin, Clerk, Master of Arts, Vicar-General, and Official Principal of the Episcopal Consistorial Court of Exeter, lawfully constituted your lawful surrogate or any other competent judge in this behalf. The party of —, clerk, rector of the rectory and parish church of —, in the county of — and diocese of Exeter, against —, of the parish of —, aforesaid, yeoman, and against any person appearing on his behalf, by way of complaint, doth say, allege, and propound, and articulately set forth as follows:

Form of *libel* in a suit for subtraction of tithe in Consistorial Court Exeter.

First,—The party proponent doth say, allege, and propound that during the whole of the years — and —, and during the months of January, February, March, April, May, June, July, August and September, in the year —, the said — was and still is the lawful and rightful rector of the rectory and parish church of —, in the county of — and diocese of Exeter, and as such was and is entitled to all and singular the great and small tithes, oblations, obventions, profits, advantages, perquisites, dues, and emoluments to the said rectory and parish church belonging or in any wise appertaining, and so was and is generally accounted, reputed, and taken to be: And the party proponent doth allege and propound every thing in this and the several subsequent positions or articles contained jointly and severally, and for any other tithe, due, matter, time, or thing as shall hereafter appear from the confessions or proofs to be made in this cause.

Second,—Also the party proponent doth say, allege and propound that the said —, in the years libelled, in each or one of them within the titheable places of the said rectory and parish of —, libelled, had the several species of things mentioned in the schedule hereunto annexed, the tithes of which have been often or at least once demanded, and are now demanded by this suit on behalf of the said —, but the said — refused or neglected fairly and truly to set out and divide the tithes of such several species of things mentioned in the said schedule hereto annexed, so that the said — might see the same justly and fairly set forth and divided as by law he was entitled to do, and refused or neglected to give any account or accounts of other matters of tithes in the said schedule mentioned as by law he ought to have done, and refused or neglected and does refuse or neglect to yield, pay, or satisfy the tithes or value of the tithe of such several species of things so mentioned in the said schedule contrary to law and justice, and be allegeth for any other sort or species of tithes not mentioned or expressed in the said schedule.

Third,—Also the party proponent doth say, allege, and propound that the said —, was and is an inhabitant of the parish of — aforesaid, within the diocese of Exeter aforesaid, and subject to the jurisdiction of this Court.

Fourth,—And the party proponent doth further say, allege, and propound that all and singular the premises were and are true, and so forth:

Whereof proof being made, and so forth.

CHAP. V.
SECT. X.

church-rate. Upon the *return* of this citation into Court, after personal service has been effected, and on an *appearance* being given by defendant, a *libel* is brought in, pleading the church to have been in need of repairs, as also incidental charges belonging to churchwardens, the meeting of vestry agreeably to public notice, the making and confirming the rate and of many of the parishioners (if it be so) having paid, the copy of the rate or assessment so far as relates to the house or grounds of defendant, and that at the time of making the rate, and the repairs and disbursements, the defendant being a parishioner was duly and justly rated at (here the amount is set forth); it then pleads that the plaintiffs were churchwardens at the commencement of the suit, the application to and refusal of defendant to pay, the jurisdiction of the Court, and concludes by alleging the complaint to be duly made, and prays the judge to condemn the defendant in the rate as assessed. On the admission of this libel, the defendant has to give in his *answer* thereto on oath; witnesses are also examined in support thereof, and if occasion should require, the judge will direct a *monition* for the production of such of the parish books as may be considered necessary. The defendant may likewise give in a *responsive allegation*, which, if admitted, the churchwardens have to *answer* thereto on oath; witnesses can also be examined on this responsive plea, and allegations may be given excepting to their testimony, if requisite.

Of the right of
Intervention by
a third party in
an ecclesiastical
suit.

In some Courts a *third person*, not originally a party to the suit or proceeding, but claiming an interest in the subject-matter, may, in order the better to protect such interest, interpose his claim, which is a proceeding termed in the Ecclesiastical Courts *intervention*. In the Mayor's Court, London, a claim of a third person somewhat of this nature, and termed a bill of proof, may also be interposed. (y)

Intervention is unknown in our Courts of Law and Equity, but it is admitted in the practice of our Ecclesiastical Courts. (z) In *Dalrymple v. Dalrymple* (a) a party was allowed to intervene after an appeal from the Consistory Court to the Court of Arches; in that case the learned judge observed, "The prin-

(y) See *post*, and 3 Chitty's Commercial Law, 633. In the Mayor's Court, a bill of proof is unnecessary where the attachment could not possibly be sustained, see 1 Marsh. Rep 233. But still it may be useful, so as to enable a party to watch and interpose in the conduct of the attachment and prevent collusion.

(z) Oughton's Ordo Judicorum, tit. 14; and Clerke Praxis Admiraltie, tit. 38, 39.

(a) 2 Hagg. Cons. Rep. 137; see also on the doctrine of intervention, *Marquis Donegal v. Chichester*, 3 Phill. 586; *Chichester v. Donegal*, 1 Addams, 5, 6; Madd. 375.

ciple of the law of intervention is, that if any third person consider that his interest will be affected by a cause which is depending, he is not bound to leave the care of his interest to either of the litigants, but has a right *to intervene* or be made a party to the cause, and take on himself the defence of his own rights, provided he does not disturb the order of the proceedings. The intervener may come in at any stage of the cause and even after judgment, if an appeal can be allowed against such a judgment. He may not know of the existence of the cause, or he may have no interest to interfere until he applies to intervene. The Orphan Board in that case were not interested in the matter in dispute until the decease of Mrs. Durr, and immediately after her death, they applied to intervene. It is immaterial in what state the cause is, if, at the time of the intervention, the proceedings are not deranged by it. In the Digest, L. 49, tit. 1, b. 5, it is laid down, that "no person is admitted to appeal against a sentence pronounced in a cause litigated between other parties except for some just cause, as when one suffers himself to be condemned in a cause to the prejudice of his co-heirs, or in any other case of the like kind." Many other cases are mentioned in this law, in which a third party has a right to intervene. They are only put as examples, the rule which they establish extending, according to the words of this law, to all cases of the same sort, that is, to all cases where the party may have an interest in the event of the suit. The same doctrine is confirmed by Voet in his Commentaries on the Pandects, lib. 5, tit. de Judiciis, sec. 35, 36, and by Peresius in his Prælectiones in Codicem, lib. 7, tit. 62, sec. 3. (b) The latter author says, "a third party may intervene whenever he becomes interested in a cause that is pending."

Vanderlinden's Judicial Practice, p. 177, has been referred to, for the purpose of shewing that an intervention could not be permitted in appeals; but that passage does not prove that in no case of an appeal can an intervention be allowed, but that interventions in appeals are not so frequently allowed as joinders are. The case referred to by that learned writer was most probably a case, in which the right of the person intervening was dependent on that of a litigant party, whose laches had already put him out of Court, and then it comes within the principle of the passages that have been already adverted to."

Although intervention is unknown in our Courts of Law and

(b) See also Voet, Com. ad Pand. lib. 42, tit. 1, sec. 29.

CHAP. V.
SECT. X.

Equity, it is admitted in the practice as well of our Ecclesiastical as our Admiralty Courts. (c)

The several Ecclesiastical Courts in general. (d)

With regard to the *Courts* exercising ecclesiastical jurisdiction, they are principally, 1. The Archdeacon's Court; 2. Each Bishop's Consistory Court; 3. Courts of Peculiars, as of a "dean and chapter," exclusive of the Bishop's Court; 4. The Arches Court, being a Court of appeal from the last two; 5. The Prerogative Court, principally relating to wills and letters of administration and suits respecting them. And from thence, as a Court of appeal now, is the *Court of the Judicial Committee* of the Privy Council, created and holden under the recent statutes. (e)

Neither of these Courts, although of considerable jurisdiction, is deemed a Court of Record, (f) their jurisdiction and powers are, however, supported and enforced by the aid of the Courts of law, and by some modern statutes. (g) It has been laid down as a general rule, that a sentence of the Spiritual Court in a matter within its jurisdiction, and on which there has been a direct issue, is conclusive until reversed in a civil action between the same parties. (h) But such sentence or act is not conclusive in a *criminal* proceeding; (i) and upon an indictment for forging a will, it may now be proved that the will was a forgery; notwithstanding the probate, until reversed, would be conclusive that the will was genuine for *civil* purposes. (k) And where a libel was exhibited in the Consistorial Court for disturbing the plaintiff in his right, interest, property and enjoyment of a pew, claimed as appurtenant to a messuage, upon which judgment was given that the pew belonged to the plaintiff, and such sentence was affirmed by the Court of Arches, who also admonished the defendant not to sit in the pew, it

(c) See Oughton's *Ordo Judiciorum*, tit. 14, and Clarke *Praxis Admiraltis*, tits. 38, 39. In *Dalrymple v. Dalrymple*, 2 Haggard's Cons. Rep. 137, a party was allowed to intervene after an appeal from the Consistory Court to the Court of Arches, and not having put in her allegation on the day assigned for that purpose, the judge rejected her prayer for further time, and concluded the cause. From this decision she appealed to the Delegates, who received her appeal and allowed her further time. See also on the doctrine of intervention, *Marquis of Donegal v. Chichester*, 3 Phil. 586; and *Chichester v. Donegal*, 1 Ad. 47, 61, note, as to hearing a counsel for intervenor.

(d) Com. Dig. Courts, N.

(e) 2 & 3 W. 4, c. 92, and 3 & 4 W. 4, c. 41, see *post*.

(f) 3 Atk. 197; 3 Bla. C. 67, 69; *Phillip v. Crawley*, Freem. 84, pl. 103; 12 Vin. Ab. 128; 1 Stark. Ev. 243.

(g) 5 S. G. 3, c. 127; 2 & 3 W. 4, c. 95.

(h) *Stedman v. Gooch*, 1 Esp. R. 6; *Dacosta v. Villa*, 2 Stra. 961; 1 Saund. 275, note (c); 1 Stark. Ev. 2 ed. 241, 243 to 245, fully.

(i) 11 State Tri. 262; 1 Saund. Rep. by Paterson & Williams, 275, note (e); Phil. on Ev. 5 ed. 353; 2 Stark. Ev. 511.

(k) *R. v. Buttery and another*, Old Bailey, 6 May, 1802; 1 Stark. Ev. 245, note (p), overruling *R. v. Vincent*, 1 Stra. 481.

was held, that these sentences were not conclusive of the plaintiff's right, in an action by him for disturbance. (*l*) The distinction appears to be when the proceeding in the Spiritual Court has or not been *in rem*. (*l*) It is therefore obvious, that in general a suit at law for disturbance in the right to a pew is preferable to a suit in the Spiritual Court. (*m*)

The *Archdeacon's Court* is the most inferior of the Ecclesiastical Courts. It may be held in the Archdeacon's absence, before his official appointed by him; and its jurisdiction is sometimes in concurrence with, and sometimes in exclusion of, the Consistory Court of the Bishop. From this Court, by 24 H. 8, c. 12, an appeal lies to the Consistory Court. (*o*)

1. Archdeacon's Court. (*n*)

The *Consistory or Diocesan Court* is the Court of every diocesan bishop, held in his cathedral, for the prosecution, hearing, and trial of *all ecclesiastical causes arising within his diocese*, (*p*) and also for granting probate and letters of administration, where there are assets only in that diocese, and not bona notabilia. (*q*) The bishop's chancellor, or his commissary, is the judge, and from his sentence an appeal lies, by virtue of the 24 H. 8, c. 12, to the archbishop of the province within which the diocese lies, viz. the Arches Court of the Archbishop of Canterbury. (*r*)

2. Consistory Court, or Diocesan of each Bishop.

The *Court of Peculiars*, as the very term imports, is an exempt jurisdiction over certain parishes dispersed through the province of Canterbury, in the midst of other dioceses, and which are exempt from the ordinary or bishop's jurisdiction, and subject to be appealed from only to the Metropolitan or Archbishop's Court. (*t*) *All ecclesiastical causes* arising within these peculiar or exempt jurisdictions are *originally* cognizable by this Court of Peculiars; and although Blackstone supposed that by 25 Hen. 8, c. 19, an appeal lies from this Court to the King in Chancery, (*i. e.* now to the Judicial Committee of the Privy Council,) yet as neither peculiars nor deans and chapters are mentioned in that act, it has been more recently held that an appeal from all peculiars and especially from the Court of the

3. The Court of Peculiars. (*s*)

(*l*) *Cross v. Salter*, 3 Term Rep. 639; Com. Dig. Courts, N. 9.

(*m*) See the pleadings at law 2 Chitty, Pleading, 817.

(*n*) Com. Dig. Court, N. 9.

(*o*) Construction of 24 H. 8. c. 12, as to appeals in *Parham v. Templer*, 3. Phil. Rep. 225 to 256.

(*p*) 3 Bla. C. 64; Law's Oughton, 2.

(*q*) *Ante*, vol. i. 522 to 529.

(*r*) *Supra*, note (*p*).

(*s*) 3 Bla. C. 65; Bac. Ab. Courts, Ecclesiastical Courts, A. 6.

(*t*) Per Sir John Nicholl in *Parham v. Templer*, 3 Phil. Rep. 245.

CHAP. V.
SECT. X.

Dean and Chapter of Exeter, lies directly to the Court of Arches, and certainly not to the Consistory Court of any Bishop. (u) Indeed in general, appeals and letters of request from peculiars lie at once to the metropolitan. (x) The Commissioners for inquiring into Courts of Justice in their report thus described the *Peculiars of the Court of Canterbury*:—
“The Peculiar of his Grace the Archbishop of Canterbury comprise a number of *parishes*, most of which are situated in London and the neighbouring counties. They are divided into *districts*, the principal of which are the deanery of the Arches in London, the deanery of Shoreham in Kent, and the deanery of Croydon in Surrey. The judge is properly dean of the Arches, an appellation not unfrequently, though inaccurately, applied to the official principal of the Arches Court of Canterbury, and these two offices have been generally, though they are not necessarily, held by the same person.” (y)

4: Arches
Court. (z)

The following account of the Court of Arches (originally called Curia de Arcubia or Bow Church, and now holden before Sir John Nicholl, (a)) is taken from the report of his Majesty's Commissioners for inquiring into the Courts of Justice, A. D. 1823. The Court of Arches is *chiefly* a Court of Appeal from the Courts of the several bishops or ordinaries within the province of Canterbury, and its *appellant jurisdiction* extends to *all causes or suits relative* to wills, intestacies, tithes, church-rates, marriages and *other matters cognizable in these Courts*. (b) But it has also an *original jurisdiction* in suits for *subtraction of legacy*, where the will has been proved in the Prerogative Court of Canterbury, (c) and where there is *not a trust* to be performed by the executor beyond that of merely paying the legacy; and it should seem that this is a preferable Court to resort to when the legacy is small. (c) It also entertains suits on *letters of request* from inferior jurisdictions within the province; (d) and it is usual to commence an original suit in this

(u) *Parham v. Templer*, 3 Phil. Ecc. Rep. 223; 11 Mod. 6; and see *Beare v. Jacob*, 2 Hagg. Ecc. Cas. 257.

(x) *Burgoyne v. Free*, 2 Addams's Rep. 406.

(y) See *Magnay v. St. Michael, &c.* 1 Hagg. Ecc. Cas. 48, note (a); Oughton's Ordo Judicorum, by Law, p. 7.

(z) *Norris v. Hemingway*, 1 Hagg. Ecc. R. 4; *Grignon v. Grignon*, 1 Hagg. 536; Oughton, tit. 15, ss. 1, 2, 9; and per Holt, C. J. 1 Lord Raym. 453; Consett on Courts, 5; and see further as to this Court, 3 Bla. C. 65; Com. Dig. Courts,

N. 3; 4 Inst. 337; *Bears v. Jacobs*, 2 Hagg. R. 258.

(a) Burn's Ecc. L. tit. Arches. He is also judge of the Peculiars of Canterbury and of the Prerogative Court.

(b) *Norris v. Hemingway*, 1 Hagg. Ecc. R. 4, note (a); *Dawe v. Williams*, 2 Add. R. 130; *Burgoyne v. Free*, 2 Add. 405.

(c) Oughton, tit. 15, ss. 1, 2, 9; and per Holt, C. J. 1 Lord Raym. 453; and see an instance of a suit for a legacy in *Norris v. Hemingway*, 1 Hagg. Ecc. R. 4.

(d) *Norris v. Hemingway*, 1 Hagg. Ecc. R. 4, note (a). See an instance of letters

Court by *letters of request*, instead of proceeding in the first instance in the Consistory Court.

CHAP. V.
SECT. X.

With respect to *Letters of Request* in general, they dispense with the necessity for instituting a suit in the first instance in the inferior jurisdiction, as in a Consistory Court, and authorize the suit to be at once instituted in or transferred to a superior Court, which could otherwise only exercise jurisdiction *as a Court of Appeal*. The judge of the inferior Court who signs the letter of request, by so doing waives or remits his own jurisdiction, and, generally speaking, at once the jurisdiction attaches in the appellate Court; and this without any consent or even communication with the intended defendant. (e) Letters of request ordinarily lie where an appeal would lie, and according to the *Canon law lie only to the next immediate Court of Appeal*, merely waiving the primary jurisdiction to the proper appellate Court, and this has given rise to the notion, generally speaking perfectly correct, that *letters of request go in the same course with appeals*; or, in other words, that the inferior ordinary must make request, or instance, of jurisdiction to that judge into whose Court the cause must have been appealed, had he himself proceeded in it in the first instance. (f) But it seems to be now settled that letters of request from the most inferior Ecclesiastical Court may be direct to the Arches Court, thereby omitting one or more other Courts of Appeal, and ousting them of their intermediate jurisdiction, which, as a Court of Appeal, they would otherwise have had. (g)

Jurisdiction of
Court of Arches
under Letters of
Request.

The present practice as to *letters of request* stands thus:— In cases where *any Diocesan Court*, within the province of Canterbury, has or claims a jurisdiction and right of adjudicating between parties residing therein, the *plaintiff* may (without the consent of the defendant or even apprising him) apply to the judge of the inferior or Diocesan Court for letters of request, in order that the cause may, in the first instance, be commenced in the *Arches Court of Canterbury*, and upon the *letters of request* being *signed* by the judge of the Diocesan Court, and accepted by the judge of the Arches, a *decree* issues under the seal of the latter Court calling upon the de-

of request from commissary of Surrey to Arches Court in a suit for perturbation of a seat, *Wyllie v. Mott*, 1 Hagg. 28, and see *Ex parte Williams*, 4 B. & C. 315; 1 Hagg. Ecc. C. 4, note (a). And see *form*, post, 498, note (h).

(e) *Burgoyne v. Free*, 2 Add. 406, where see observations on letters of request.

(f) *Ibid.*

(g) *Ibid.* 405 to 414.

CHAP. V.
SECT. X.

fendant to answer the charges therein preferred against him.
The *form* of such letters of request is subscribed. (*k*)

Jurisdiction of
Arches as a
Court of Ap-
peal.

As instances of *appeals* to the Court of Arches, we find suits for defamation removed from the Commissary Court of Surrey, and from the Consistory Court of Exeter into the Arches Court, and the sentence below afterwards reversed or affirmed with costs in both Courts. But it has been doubted whether the Court of Arches is empowered in any case to pronounce a sentence of deposition or deprivation. (*i*).

Mode of reco-
vering a *Legacy*
in Court of
Arches and
Diocesan
Courts.

Dr. Haggard, observing that the simple mode pursued in the Ecclesiastical Courts for enforcing payment of legacies is but little known, thus states the course of proceeding for a legacy in the Arches Court, in cases of all wills proved by the Prerogative Court, and by the official principals of each diocese, in cases of wills proved in the Diocesan Courts. He says, "the course of proceeding in the Arches Court is usually as follows. (*k*) The executor being *cited* to answer the legatee in a suit of subtraction of legacy, after appearance given, a short libel is brought in pleading that A. B. made a will, that he thereof appointed C. D., executor, and is since dead, leaving bona notabilia, and without revoking or altering his will; that since his death C. D. has proved such will in the Prerogative Court of Canterbury; that by his will A. B. left a legacy to E. F. in

Form of Letters
of Request for
instituting a di-
vorce suit in
Arches Court
instead of Dio-
cesan Court.

(*h*) Whereas A. B. of the parish of ———, in the county of Middlesex, in the diocese of London, Esquire, doth intend to commence and prosecute against his wife E. of the same parish of ———, and county of ———, and diocese of ———, a certain cause or suit of divorce or separation from bed, board and mutual cohabitation, by reason of adultery by her the said E. committed, and for that purpose hath requested me the Worshipful ———, Vicar-General of the Right Reverend Father in God, ———, by divine permission, Lord Bishop of ———, and official principal of his consistorial and episcopal Court of ———, to grant to him *letters of request* that he may apply for the original citation or decree in the said cause or suit in the Arches Court of Canterbury. And whereas the applying for the said original citation or decree in the Arches Court of Canterbury will, as it is represented to me, be of advantage to all the parties, not only from the able assistance they can have of counsel in the said Arches Court of Canterbury, but as the same will be also a more ready and expeditious way for the hearing and finally determining the said cause: These are, therefore, at the *deces* of the said ———, to request, and I do hereby request, the Right Honourable ———, Doctor of Laws, official principal of the said Arches Court of Canterbury, to decree a citation or decree to issue under seal of the said Arches Court of Canterbury, at the instance of the said ———, and thereby to cite her the said ———, to appear personally before him or his lawful surrogate, or other competent judge, in this behalf, and answer to the said ——— in his aforesaid cause or suit of divorce by reason of adultery, and to hear and finally determine the said cause according to law. In witness whereof I have hereunto set my hand and seal, this ——— day of ———, in the year of our Lord, ———.

L. S.

Signature of the Judge of the Inferior Court.

Signed, sealed and delivered in the presence of ———.

(*i*) *Cole v. Corder*, 2 Phil. Rep. 106; *Tocker v. Ayre*, 3 Phil. R. 539.

(*k*) *Cassel v. Roberts*, 3 Hagg. Ecc. R. 161, note (*a*).

the following terms, [the clause of the will containing the legacy is here recited,] that this legacy remains unsatisfied, and that C. D. is possessed of and has admitted assets; has been applied to and refuses payment; and further pleads the identity of E. F., and the legatee, and that he is of age; and the libel concludes with a prayer that the executor may be compelled to pay the legacy, and be condemned in costs. The records of the Prerogative Court prove all the facts, except the assets, age and identity of the legatee; and the executor is, upon the libel being admitted, assigned to give in his answer, which he must do on his oath: should he in his answer deny assets, or the legatee's identity or age, witnesses may be examined. Sometimes, as in the case in the text, there may be some special circumstances stated in the libel, and the executor also may plead responsively: but in a great majority of cases, the legacy is paid either as soon as the citation is taken out, or as soon as the libel is admitted. From the early stage in which these suits usually terminate, they pass in a degree *sub silentio*, and are thus generally supposed more than is really the case. *Of late they have, it is believed, become more frequent than they were a few years since.* Sometimes, as a preliminary proceeding, an inventory and account is called for in the Prerogative Court, and which it is advisable to apply for before the commencement of the proceeding, when it is at all apprehended that the executor will dispute his having received assets." (l) The bill for establishing Local Courts proposed that those Courts should be entrusted with a jurisdiction for the recovery of legacies, in which the course of proceeding would not have been very dissimilar from that above detailed; but Dr. Haggard observes, that "*possibly if the extremely simple, cheap and expeditious jurisdiction now exercised by the Ecclesiastical Courts in this class of cases were more generally known—still more if it were extended to the recovery of legacies charged on the realty—the want of any further remedy would not be felt.*" (m)

The Court is now holden by its judge, in his quality of Official Principal, or by his Surrogate, in the Common Hall of the College of Advocates, within the parish of St. Benedict, near Paul's Wharf, London. (n) Formerly, from this Court, by 25 H. 8, c. 19, the appeal was to the Court of Delegates; but by

(l) See *ante*, vol. i. 518, 519, as to an executor's inventory or declaration in lieu thereof.

(m) Dr. Haggard's note, 3 Hagg. Ec. Cas. 161, note (d). The author, on a very recent examination into the practice

in suits of this nature, found it precisely to accord with the above extract from Dr. Haggard's Reports.

(n) Oughton, *Ordo Judiciorum*, by Law, 7.

CHAP. V.
SECT. X.

the recent enactments that jurisdiction has been repealed, and the appeal must now be to the Court of the Judicial Committee of the Privy Council. (o)

5. Prerogative
Court. (p)

The Archbishop of Canterbury (and of York also) has his *Prerogative Court*, as well for *proving wills* and *granting letters of administration*, when the deceased, being a subject, has left *bona notabilia* in different dioceses, as for instituting, hearing and determining *all causes*, formal or summary, (i. e. on motions,) *relating to wills*, or administrations, or legacies, before a judge appointed by the archbishop, called the Judge of the Prerogative Court. But in the case of the *King* this Court has no jurisdiction over his supposed will. (q) Formerly an appeal from this Court was to the Delegates; (r) but under the recent act the appeal is to the Judicial Committee of the Privy Council. (s) This Court properly hears all *suits* and *proceedings* relative to the *grant* of probate, (t) or of letters of administration, and to the *assignment* of *administration bonds*. We have in the preceding volume, when examining the conduct to be pursued by executors and administrators, stated in part how and where probate and letters of administration are to be obtained, (u) and therefore only a few practical observations will here be added, with a statement of the practice respecting *Caveats*, to prevent the obtaining probate or letters of administration; and proceedings to compel *sureties* in an administration bond to *justify*.

Proceedings to
obtain preroga-
tive probate or
letters of admin-
istration. (x)

The mode of proceeding to obtain probate of a will, or letters of administration to the effects of a person deceased, is, for the executor appointed by the will, or party entitled to administration, to apply to a proctor of the Ecclesiastical Court. The party applying, if he be an executor, or entitled to the administration of an intestate's effects, is sworn before a surrogate of the judge to the *full value* of the deceased's personal estate, without deducting the debts due from him; (y) the original will

(o) Per Sir J. Nicholl, in *Parham v. Templer*, 3 Phil. R. 255.

(p) 3 Bla. Com. 65; Com. Dig. Courts, N. 2; Bac. Ab. Courts, Eccles. Courts, A. 3; Law's Oughton, 55.

(q) In the goods of his late majesty, King George the Third, on motion, 1 Addams's R. 255, a case of an alleged bequest of George the Third to Olive, Princess of Cumberland. This is an interesting document.

(r) 3 Bla. Com. 65, 66; 25 H. 8, c. 19.

(s) 2 & 3 W. 4, c. 92; 3 & 4 W. 4, c. 41.

(t) Law's Oughton, 57.

(u) *Ante*, vol. i. 521 to 529; and see further at the close of this work.

(x) The following practical directions and observations are from the pen of a most experienced proctor. See also further particulars and decisions, *ante*, vol. i. 525 to 529.

(y) *Ante*, vol. i. 523; and 55 G. 3, c. 184, s. 38; and see form of oath, *ante*, vol. i. 525, note (z); but *desperate* or *doubtful* debts need not be included before they have been actually received, *ante*, vol. i. 522.

is to be deposited in the public registry of the Ecclesiastical Court, and probate of a collated engrossed copy is granted. The probate and administration are documents on parchment, in which is stated the name and late residence of the deceased, and also the name of the executor or administrator, by what Court, and the day on which it is granted. The form of a *Prerogative Probate* is in the subscribed note. (s) The proceedings to obtain *letters of administration*, and the form of *affidavit*, and of the warrant for granting administration, will be found in the preceding volume. (a) The form of *Letters of Administration* granted by the Prerogative Court is given in the subscribed note. (b) The 22 & 23 Car. 2, c. 10, contains the form of the

(s) William, by Divine Providence, Archbishop of Canterbury, Primate of all England and Metropolitan, do by these presents make known to all men that on the — day of —, in the year of our Lord one thousand eight hundred and thirty-four, at London, before the Worshipful —, Doctor of Laws, Surrogate of the Right Honourable —, Doctor of Laws, Master, Keeper or Commissary of our Prerogative Court of Canterbury, lawfully constituted, the last will and testament of A. B., late of Kensington, in the parish of Saint Mary Abbott, Kensington, in the county of Middlesex, and of Bruisyard, in the county of Suffolk, deceased, hereunto annexed, was proved, approved and registered, the said deceased having, whilst living, and at the time of his death, goods, chattels or credits in divers dioceses, or jurisdictions, by reason whereof the proving and registering the said will, and the granting administration of all and singular the said goods, chattels and credits, and also the auditing, allowing and final discharging the account thereof, are well known to appertain only and wholly to us, and not to any inferior judge; and that administration of all and singular the goods, chattels and credits of the said deceased, and any way concerning his will, was granted to E. B., widow, the relict of the said deceased, the sole executrix named in the said will, she having been already sworn well and faithfully to administer the same, and to make a true and perfect inventory of all and singular the said goods, chattels and credits, and to exhibit the same into the registry of our said Court on or before the last day of — next ensuing, and also to render a just and true account thereof. Given at the time and place above written, and in the — year of our translation. And see as to *Probates*, ante, vol. i. 526.

(a) As to Letters of Administration, ante, vol. i. 526, 527.

(b) William, by Divine Providence, Archbishop of Canterbury, Primate of all England and Metropolitan. To our well-beloved in Christ E. B., widow, the relict of A. B., late of —, in the parish of —, in the county of Middlesex, deceased, greeting: Whereas the said A. B., (as is alleged) lately died intestate, having, whilst living, and at the time of his death, goods, chattels or credits, in divers dioceses or jurisdictions, by reason whereof the sole ordering and granting administration of all and singular the said goods, chattels and credits, and also the auditing, allowing and final discharging the accompt thereof, are well known to appertain only and wholly to us, and not to any inferior judge: we being desirous that the said goods, chattels and credits, may be well and faithfully administered, applied and disposed of according to law, do therefore by these presents grant full power and authority to you, in whose fidelity we confide, to administer and faithfully dispose of the said goods, chattels and credits, and to ask, demand, recover and receive whatever debts and credits, which, whilst living, and at the time of his death, did any way belong to his estate, and to pay whatever debts the said deceased at the time of his death did owe, so far as such goods, chattels and credits will thereto extend, and the law requires: You having been already sworn well and faithfully to administer the same, and to make a true and perfect inventory of all and singular the said goods, chattels and credits, and to exhibit the same into the registry of our Prerogative Court of Canterbury on or before the last day of — next ensuing, and also to render a just and true account thereof, on or before the last day of —, which shall be in the year of our Lord one thousand eight hundred and —: and we do by these presents ordain, depute and constitute you E. B., administratrix of all and singular the goods, chattels and credits of the said deceased. Given at London the — day of —, in the year of our Lord one thousand eight hundred and thirty-four, and in the — year of our translation.

Form of Probate granted by Prerogative Court to a sole executrix.

Sworn under £—, and that the testator died on the — day of —, A. D. 1834.

Form of Letters of Administration granted by the Prerogative Court to the widow of intestate.

Sworn under £—, and that the intestate died on the — day of —, A. D. 1834.

CHAP. V.
SECT. X.

administration bond, and the parts of which, as well as the remedies thereon, will be presently noticed.

Proceedings to enter a *caveat* so as to prevent grant of probate or of letters of administration. (b)

For the purpose of allowing any person interested in the deceased's effects an opportunity of contesting the validity of a will, or the right of a party to administration, such person can, upon application to a proctor, *procure a caveat to be entered in the public registry against a grant of probate or administration issuing unknown to the proctor who entered such caveat*. This *caveat* is entered on behalf of the interested party, in a *fictitious* name, (as "John Thomas.") By this preliminary measure the party objecting can be apprised of the name and the interest of the party to whom the probate or administration may afterwards be applied to be granted. Caveats are generally entered on the behalf of legatees in a will, or the next of kin, being the parties entitled in distribution of an intestate's effects, after payment of debts or of creditors of the deceased. The usual form of caveat is subscribed. (b) The further proceedings on such a caveat will be presently stated. (c)

Of obtaining an inventory or declaration in lieu.

In many cases parties beneficially interested in the due distribution of the assets, may call upon the parties to whom the probate or administration is to issue, and prior to its passing the seal, to give into Court a declaration in lieu of a detailed inventory of the deceased's effects. This declaration, without specifying the particular effects, gives a general account thereof and of their real or presumed value, according to the belief of the parties on their oath. (d)

Of the administration bond.

In all cases where *administration* issues, a *bond* is entered into, wherein the amount of the penalty should be double the value of the deceased person's effects. With two or three exceptions, the administrator is required to procure two persons as sureties, who sign a *bond* to the effect that the administrator will faithfully administer the effects according to law.

Of requiring the sureties in such bond to justify.

In some instances the *sureties are called upon to justify*, that is, to depose on oath that they are worth the amount of the penalty mentioned in the bond after payment of their just debts. But in general, (although certainly advisable so as to subject them to a prosecution for false swearing,) the sureties are not called upon to declare whether they are worth the amount of

Form of caveat.

(b) Let nothing be done in the goods of A. B., late of —, in the parish of —, in the county of —, deceased, unknown to E. F., proctor for John Thomas, (usually a fictitious name,) having interest." See the further proceedings on such caveat, *post*, 503.

(c) *Post*, 503.

(d) *Ante*, vol. i. 518, 519.

the penalty; and in no case can they be required to state the particulars of their property as bail justifying in a superior Court at Westminster are compellable to do. (e) In which respect the practice of these Courts requires amendment, as it too frequently turns out that the sureties are wholly insufficient, and the creditors or next of kin are without redress. (f) The form of the affidavit of the *sureties* is subscribed in the note. (g)

A husband resident abroad may be directed, on the application of creditors, to give *justifying* security resident within the jurisdiction, on his taking a grant of administration to his wife. (h)

The preliminary proceeding generally adopted by parties having a right to contest the validity of a will, is to *cause a caveat to be entered* in the public registry of the Court of Probate, claiming jurisdiction over the assets of the deceased as we have just noticed. This course prevents the executors therein named, or party applying for probate, from obtaining it, without first establishing the validity of the will; and should the party, who entered the caveat, decide upon opposing the will, then the person applying for the grant has to *propound* the same and give in an *allegation*, the contents of which are generally confined to stating or pleading the making and executing the will, and the capacity of the deceased at the time of such execution. The party opposing the validity of the will is then to give in his *answer on oath* to the allegation, and witnesses are examined in proof of the will. A *response*, or rather an *allegation*, pleading the facts and circumstances and grounds of contesting the validity of the will, is then given in, and when admitted, the *answers* of the adverse party on oath are directed by the Court to be brought in by a time fixed. A *counter plea*, contradictory of the averments contained in the allegation of the party opposing the will, or explanatory of circumstances therein mentioned and pleaded, is given in by the party propounding.

Of proceedings
on the caveat
and contesting
the validity of a
will.

(e) 2 Phil. R. 280. (f) As in *Archbishop of Canterbury v. Tappen*, 8 B. & C. 150.

(g) In the goods of ———, deceased.

Appeared personally E. F., of ———, in the parish of ———, in the county of ———, and G. H., of ———, in the parish of ———, in the county of ———, the proposed sureties for Y. Z., the administrator of all and singular the goods, chattels and credits of A. B., late of ———, in the parish of ———, in the county of ———, deceased, and made oath that they are respectively worth the sum of ——— pounds after payment of their respective just debts.

On the ——— day of ———, A. D. 1834,
the said E. F. and G. H. were duly sworn
to the truth of foregoing affidavit.

Before me,

——— Surrogate.

Form of affidavit of sureties justifying.

(h) In the goods of Noel, 4 Hagg. Rep, 207; ante, 502, 503.

CHAP. V.
SECT. X.

The *answer* of the opposing party is given on oath; witnesses are examined on the several allegations; then publication of their evidence takes place, and if it is not excepted to, the judge proceeds to hear and decide the cause.

A few points relating to suits and proceedings connected with probate and letters of administration, &c.

According to the practice of the Prerogative Court, the facts intended to be relied upon in support of any *contested suit*, are set forth in a plea, which is termed an allegation, and then is submitted to the inspection of the counsel of the adverse party; and if it appear to him objectionable either in form or substance, he *opposes the admission* of it. If the opposition go to the substance of the allegation, and it is well founded, then the Court rejects it, by which mode of proceeding the suit is terminated without going into any proof of the facts. (f)

The Court of Arches attached to it has jurisdiction over all legacies charged upon or payable out of personal property, and when there is not any *continuing trust*. (g) In the Prerogative Court all causes are *summary*. (h) By the practice of the Prerogative Court, the general rule as to costs is, that a party failing in a cause should pay the costs; but that rule is subject to the exception when the Court feel satisfied that proper grounds existed for making a claim. (i)

As regards *limited administration*, the Prerogative Court of Canterbury will, *on motion*, grant an administration limited to assign *a term* in the diocese of A., the will of the deceased (who had no goods out of the diocese of B. except this satisfied term,) having been proved in the Court of B., and the chain of executors being subsequently unbroken; and it seems that a diocesan probate can give no authority nor continue any privity as to a satisfied term in another diocese: (k) and on *petition* the Prerogative Court granted a limited administration to assign a satisfied term even in another diocese. (l)

Where a solicitor retained a will which he had prepared as a lien, and the Court of King's Bench had granted a prohibition to the Prerogative Court, staying any proceeding under the will until the lien had been satisfied, that Court nevertheless granted administration to the widow of the testator, limited to her sale of silks, which would deteriorate in value if they

(f) Note to *Thorold v. Thorold*, 1 Phil. Rep. 1.

(g) *Grignon v. Grignon*, 1 Hagg. R. 535.

(h) Law's Oughton, 59.

(i) Per Sir J. Nicholl in *Cox v. His Majesty's Proctor and Lannesley Prero-*

gative Court, 3d July, 1834.

(k) *In goods of Mary Powell*, 3 Hagg. R. 195; and see *Fowler v. Richards*, 5 Russ. 39.

(l) *Crosley v. Archdeacon of Sudbury*, 3 Hagg. R. 197.

should remain unsold, and to bring actions and dispose of the sale of stock. (*m*)

CHAP. V.
SECT. X.

In this Court summary applications are to be made for the delivery out of administration bonds executed in pursuance of the 22 & 23 Car. 2, c. 10, so as to enable the creditors or legatee or next of kin to proceed in an action at law in the name of the obligee (in the case of a prerogative administration, the Archbishop of Canterbury,) against the principal or sureties for a breach or breaches of the *condition*, the form of which is prescribed by the statute 22 & 23 Car. 2, c. 10, s. 2, (*n*) viz. for five distinct acts ;—1st. For the administrator's making a perfect inventory of the deceased's effects ; 2dly. His exhibiting the same into the registry of the Court at or before a named day ; 3dly. Well and truly to administer, according to law, the effects that shall come to hand according to law, meaning duly to satisfy *creditors* in due order ; 4thly. To

Application for assignment of administration bond, and action thereon.

(*m*) In the goods of Wood, deceased, before Sir J. Nicholl, Prerogative Court, 3d July, 1834. Dr. Lushington made an application to the Court in this case under the following circumstances :—The deceased, Mr. Wood, of Manchester, died in the present year, leaving a will, dated in 1831, in the possession of the solicitor who prepared it, Mr. Law, and who refused to deliver it up, contending that he had a lien upon it. A monition had issued against him and he had been pronounced in contempt. On the 5th of June a rule nisi had been granted in the Court of King's Bench, to shew cause why a writ in the nature of a prohibition should not issue to stay proceedings in this Court till the lien of Mr. Law was discharged, and which had been enlarged to the first day of next term. The only object of the rule was to protect the lien of Mr. Law ; but the effect of staying proceedings altogether would be greatly to deteriorate the value of the property. The deceased had been a manufacturer and printer of cottons and other goods for home consumption, of which he left a considerable stock, which was adapted to the fancy of purchasers, and unless sold in the season, the articles would be deteriorated one half. Debts were also to be sued for and received. He submitted that the Court could grant a limited administration to dispose of the stock, to recover and pay debts, discharge the men, and give up warehouses.

Dr. Lushington said he remembered a case in which a similar application had been granted. A gentleman arrived from the West Indies with a large cargo of cotton, and he died almost immediately on his arrival. Evidence was found among his

papers that a will had been made ; and the Court, on being applied to, granted a limited administration to sell the goods. A power to the same extent was sought in the present case, and also that the widow might be enabled to collect in the accounts and apply them to the discharge of certain debts.

Sir J. Nicholl said, the power to pay debts could not certainly be granted ; as, if it were, an undue preference might by possibility be given to some creditors ; and it was the duty of the Court to take care that nothing was done to prejudice the party having the lien.

Dr. Lushington hoped that the widow would, at all events, be permitted to discharge the warehousemen, and also to give up the warehouse, as very great expense was at present unnecessarily incurred.

Sir J. Nichol, after some further discussion, ordered that a limited administration should be granted to the widow, to enable her to collect the debts, and to bring actions for debts, and also to dispose of the stock in trade.

In another note of this case it was stated, that after argument by Mr. Follett for Mr. Law, and Mr. Wightman for Mrs. Wood, a prohibition was actually issued to the Prerogative Court, staying any proceedings under the will until the lien had been satisfied, *sed quære*. As to whether a lien on an original will could exist, see *Georges v. Georges*, 18 Ves. 294 ; ante, vol. i. 513, note (*n*).

(*n*) See the last construction of that statute and the condition of the bond in *Archbishop of Canterbury v. Robertson*, 3 Tyrw. Rep. Exch. 390 to 419.

CHAP. V.
SECT. X.

make a true and just account of such his administration before a named day; 5thly. To deliver and pay the residue, i.e. after satisfying creditors, as shall be *decreed* by the judge of the Court. It follows that the obligors may be sued if the administrator be guilty of a breach of either of these stipulations; as if he do not duly administer the assets by paying creditors, and especially if he misapply or appropriate them to his own use; or finally, if he be *decreed* to pay the residue to a named person or persons and neglect to do so. (o) And if an administrator has been guilty of a devastavit he may be sued in the name of the archbishop by a creditor or legatee, or next of kin, although there has not been any decree as to the residue. (p) And though it is stated that the Prerogative Court never requires an administrator to deliver an inventory or account before citation, and that the same is very seldom delivered until called for, (q) yet it has been held that a legatee or next of kin may assign a breach in not delivering a perfect inventory, and this even without citation; (r) but then on such a breach the damages would probably be merely nominal. (s)

We have seen that the right to call for a final inventory may be prejudiced, if not annulled, by delay in calling for it; (t) and in a recent case it was held, that an application to the Prerogative Court to have the administration bond delivered out so as to sue at law thereon, after great delay, was too late; (u)

(o) *The Archbishop of Canterbury v. Robertson*, 3 Tyrw. Rep. 300, and cases there collected.

(p) *Id. ibid.*; *Canterbury v. Howes*, Cowp. R. 140; *Folkes v. Dominique*, 2 Stra. 1137; Chitty's Col. Stat. 324.

(q) *Archbishop of Canterbury v. Robertson*, 3 Tyrw. 395; *ante*, vol. i. 517.

(r) *Greenside v. Benson*, 3 Atk. 252; and see *Archbishop of Canterbury v. Waldron*, in K. B. G. H. 8 Feb. 1820, MS.; Chit. Col. Stat. 324, in notes.

(s) See observations in *Archbishop of Canterbury v. Robertson*, 3 Tyrw. Rep. 410; but see per Chambre, J., *Plomer v. Rose*, 5 Taunt. 391.

(t) *Ante*, vol. i. 517, note (g); *Ritchie v. Rees*, 1 Add. 144; *Pitt v. Woodham*, 1 Hagg. R. 247.

(u) *Robson v. Leek and another*, Prerogative Court, 10 July, 1834. Sir John Nicholl gave sentence in this case, which was an application to have the administration bond delivered out, in order to its being sued upon in a court of law. The learned judge, after commenting upon the reported cases, especially that of "*The Archbishop of Canterbury against Howes*," Cowp. 140, was of opinion that this Court had a discretion to judge of the expediency of allowing the bond in such cases

to be attended with; and, considering the great lapse of time which had taken place in this case, during which no steps had been taken against the proper parties, and the irregularities in the proceedings, he should decline complying with the application, and dismiss the parties proceeded against. He was the less reluctant to come to this decision, because, besides a Court of Appeal, the party making the application might have recourse to a Court of Law or a Court of Equity.

In *Hunt against Burton and Fauntleroy*, which was a similar application, Sir John Nicholl distinguished that case from the last. Here the breach of the bond was apparent, for of four conditions three had been violated. The delay of fourteen years was in some measure accounted for, and steps had been taken in Chancery. It was quite clear that there had been a breach of the bond; there was, therefore, *prima facie* ground for complying with the application; and there being no sufficient reason shewn to the contrary, the Court, he thought, was bound to allow the party to resort to a Court of Law for such redress as could be obtained by a suit upon the bond. He should therefore overrule the protest, and direct the bond to be delivered out

but in another case, where the delay was accounted for, and there had been proceedings in Chancery, the application succeeded. (x) Generally speaking, if it be made appear that an administration bond has been forfeited, it is the duty of the Court to enable a creditor, or legatee or next of kin to sue thereon in the name of the obligee, leaving the ultimate liability of the sureties to be tried in such suit. (y) If the assignment of the bond should be refused, the parties must have recourse to a Court of Law or Equity, and we have seen that when the estate is considerable the safest course is to file a bill in equity in the first instance, so as to secure the fund. (z) And as a Spiritual Court cannot try whether an administrator has paid a creditor his debt or not, or award payment thereof by him, but must take the account as it is sworn without further investigation in that Court; (a) it follows that when the correctness of the administrator's account is disputed, the proceedings in a Court of Equity, where they can be examined into, are preferable.

The archbishop has what is termed a *Court of Faculties*, which as it does not hold plea in *any suits*, ought not, perhaps, strictly to be here mentioned; but yet it may be proper to notice it, because it is in this Court that the rights to pews and monuments and other rights of burial, so interesting to individuals and their relatives, are created. It has also various other powers under 25 Hen. 8, c. 21, in granting licenses, dispensations, faculties, &c. (c) Thus in the Peculiar Court of Canterbury, a license and faculty may be obtained by executors for setting apart, appropriating and conferring a vault made in a church, "for the use of a particular family, as long as they continue parishioners and inhabitants;" provided it appear to the Court that no injury will result to the rest of the parishioners; (d) and the obtaining such a faculty seems to be the only secure mode of appropriating a pew de novo. (e) If a faculty for annexing a pew to a messuage has been obtained by surprise and undue contrivance, it may be revoked on appeal to the Court of Arches. (f)

6. The Court of Faculties. (b)

(x) *Hunt v. Burton and another*, same day, see last note.

(y) *Devey v. Tupper*, 3 Add. R. 68.

(z) *Ante*, vol. i. 716 a, note (i), and 552; *Sharples v. Sharples*, M'Clel. Rep. 506.

(a) Toller, 495; 3 Tyrw. R. 409, n. (b).

(b) See in general, Com. Dig. Courts, N. 5.

(c) Com. Dig. Courts, N. 5.

(d) *Magnay v. Rector*, 1 Hagg. 48; and

see *Wyllie v. Mott*, id. 34; *Butt v. Jones*, 2 Hagg. 423; *Rich v. Bushnell*, 4 Hagg. 164; *Fuller v. Lane*, 2 Add. Rep. 419; 1 Phil. Rep. 232, 237; *Woollocombe v. Ouldrige*, 3 Add. R. 1.

(e) *Ante*, vol. i. 50 to 52; *Wyllie v. Mott*, 1 Hagg. 39; *Blake v. Osborne*, 3 Hagg. 726.

(f) Per Sir John Nicholl in *Butt v. Jones*, 2 Hagg. 419.

CHAP. V.
SECT. X.

So the obtaining a faculty is the only legal mode of erecting an organ in a parish church, (g) or to level a church-yard, &c. (h) The same law applies to monuments and vaults. (i)

SECT. XI.—Of the Court of Admiralty.

The Divisions, and its Jurisdiction in general.

I. When the Court has Jurisdiction.

1. Jurisdiction in Cases of Torts.

1. In a Suit for a Sea Battery.
2. In a Suit for Collision of Ships.
3. In a Suit for Possession of a Ship.
4. In a Suit for Restitution of Goods piratically or illegally taken, but not as Prize.

2. Jurisdiction in cases of Contracts express or implied.

1. Suits between Part-Owners of a Ship.
2. Suits for Mariners' Wages.
3. Suits for Pilotage.
4. Suits on Bottomry Bonds.
5. Suits and proceedings for Salvage.
6. Wreck.

II. When the Court has not Jurisdiction.

III. Course of Proceedings in this Court.

SECT. XI.
Of the Court of Admiralty. (k)

The *Court of Admiralty* (also termed the *Instance Court*) is a mere municipal tribunal, (l) perfectly distinct from the *Prize Court*, which is principally an international Court, existing only during war or until the litigations incident to war have been brought to a conclusion, (l) although frequently confounded in consequence, perhaps, of the same judge usually presiding in both Courts; indeed it will be observed, upon examination of the commission under which the *Court of Admiralty* proceeds, that the term *prize* is not once therein used. (m) It is a Court principally for the determination of *private* injuries to *private* rights arising *at sea* or *intimately connected with maritime subjects*, the principal of which are enumerated in a recent act, 2 W. 4, c. 51, s. 6, which removes all doubts as to the jurisdiction of the *Vice-Admiralty Courts abroad*, and enables them to hear and determine suits for *seamen's wages*, *pilotage*, *bottomry*, *damage to a ship by collision*, contempt in breach of the regulations and instructions relating to his Majesty's service *at sea*, (n) *salvage*, and *droits of Admiralty*, when a ship or its master shall come within the local limits of the *Vice-Admiralty Court abroad*, and notwithstanding the cause of such action

(g) *Pearce v. Rector of Clapham*, 3 Hagg. 12.

(h) *Sharpe v. Sangster*, 3 Hagg. 335.

(i) *Seager v. Bowle*, 1 Add. 541. 554.

(k) See in general Clarke's Praxis; 3 Bla. Com. 68, 69, 106; Bac. Ab. Court of Admiralty; Com. Dig. Court of Admiralty.

The jurisdiction, practice and fees of the *Vice-Admiralty Courts abroad* are settled by 2 Wm. 4, c. 51. If a *Vice-Admiralty Court* had no jurisdiction, then

the Court of Admiralty has no jurisdiction on appeal. See the *Hercules*, 2 Dodson's Ad. Rep. 356.

(l) Per Sir Wm. Scott, 1 Dodson's Ad. Rep. 99, 100.

(m) Per Cur. in *Le Caux v. Eden*, Dougl. 572, 612.

(n) A *Vice-Admiralty Court abroad* has no jurisdiction in a cause of breach of revenue, unless under some express statutory institution. Per Sir Wm. Scott, *The Hercules*, 2 Dodson's Ad. R. 356.

arose elsewhere.” (o) The Vice-Admiralty Courts abroad, and this Court as a Court of Appeal therefrom, have not, it should seem, any *original* jurisdiction in *revenue cases*, unless under express statute, and by 49 G. 3, questions of that nature must be tried where the offence was committed or the seizure made. (p) It has been observed by the highest authority, on the question of the jurisdiction of this Court, that a great part of the powers given by the terms of the commission or patent of the judge of the High Court of Admiralty, are totally inoperative, and that its active jurisdiction stands in need of the support of *continued exercise and usage*. (q) Indeed the commission has been narrowed rather than extended in jurisdiction by construction. (r)

The ancient statutes, 13 Rich. 2, c. 5; 15 Rich. 2, c. 3; and 2 H. 4, c. 11, (s) as well from the recitals as their enactments,

(o) 2 W. 4, c. 51, s. 6, &c.

(q) Per Lord Stowell, in *Apollo*, 1 Hag.

(p) *The Hercules*, 2 Dodson's Ad. R. Ad. R. 312.
353.

(r) *Id.* 309.

(s) The first prohibits the Court of Admiralty from intermeddling with any matter done within the realm, but only “*of a thing done upon the sea.*” The second is to the same effect; and the third act enforces the regulation by giving an action on the case to the party aggrieved by wrongful assumption of jurisdiction, to recover double damages, and ten pounds to the king if attainted.

13 Rich. 2, c. 5. What things the Admiralty and his deputy shall meddle.—Item. Forasmuch as a great and common clamour and complaint hath been oftentimes made before this time, and yet is for that the Admirals and their deputies hold their sessions within divers places of this realm, as well within franchise as without, accroaching to them greater authority than belongeth to their office, in prejudice of our lord the king and the common law of the realm, and in diminishing of divers franchises, and in destruction and impoverishing of the common people, it is accorded and assented that the admirals and their deputies shall not meddle from henceforth of any thing done within the realm, but only of a thing done upon the sea, as it hath been used in the time of the noble Prince King Edward, grandfather of our lord the king that now is.

15 Rich. 2, c. 3. In what places the admiral's jurisdiction doth lie.—Item. At the great and grievous complaint of all the commons made to our lord the king in this present parliament, for that the admirals and their deputies do incroach to them divers jurisdictions, franchises, and many other profits pertaining to our lord the king, and to other lords, cities and boroughs other than they were wont or ought to have of right, to the great oppression and impoverishment of all the commons of the land, and hinderance and loss of the king's profits, and of many other lords, cities and boroughs through the realm, it is declared, ordained and established, *that of all manner of contracts, pleas and quarrels, and all other things rising within the bodies of the counties, as well by land as by water, and also of wreck of the sea, the Admiral's Court shall have no manner of cognizance, power nor jurisdiction, but all such manner of contracts, pleas and quarrels, and all other things rising within the bodies of counties as well by land as by water as afore, and also wreck of the sea, shall be tried, determined, discussed and remedied by the laws of the land, and not before nor by the Admiral nor his lieutenant in any wise; nevertheless of the death of a man and of a maihem done in great ships being and hovering in the main stream of great rivers, only beneath the bridges of the same rivers nigh to the sea, and in none other places of the same rivers, the Admiral shall have cognizance; and also to arrest ships in the great flotes for the great voyages of the king and of the realm, saving always to the king all manner of forfeitures and profits thereof coming; and he shall have also jurisdiction upon the said flotes during the said voyages only, saving always to the lords, cities and boroughs their liberties and franchises.*

2 Hen. 4, c. 11. A remedy for him who is wrongfully pursued in the Court of Admiralty.—Item. Whereas in the statute made at Westminster the thirteenth year of the said King Richard, amongst other things it is contained, that the admirals and

CHAP. V.
SECT. XI.

shew how much jealousy was anciently entertained of the jurisdiction of this Court, and the late Lord Tenterden, in his admired work on Shipping, adverts to the *flame of jealousy* formerly prevailing in Westminster Hall against all the Courts at Doctors' Commons, including as well the Spiritual as the Admiralty Courts. (t) Those jealousies however have long since subsided, and the same observations that have, we may remember, been made respecting the Ecclesiastical Courts, equally apply to the modern judges of the High Court of Admiralty. (u) The successive judges of that Court, indeed, so far from evincing any desire improperly to assume jurisdiction which it has not, state it as an invariable maxim, that the Court is *ex mero motu* bound to reject what does not belong to its jurisdiction, (x) though in cases free from doubt it is also bound to exercise and not abdicate that jurisdiction with which it has been invested, and ought usefully and beneficially to employ on behalf of its suitors. (y)

The jurisdiction
of the Court of
Admiralty in
general.

This Court has jurisdiction to try and determine most *maritime causes* or suits for *private* injuries, which, although had the same transaction entirely occurred on shore, would in their nature have been of common law cognizance; yet having been either committed on the high seas, or connected with maritime transactions, are therefore considered better to be examined and remedied in this peculiar Court, which, from its very constitution and practice, is better informed upon nautical subjects than any common law Court, especially as it has power to convene and have the assistance of two or more naval and other personages to assist its judgment. The statutes 13 Rich. 2, c. 5, 15 Rich. 2, c. 3, and 2 Hen. 4, c. 11, however direct, that the admiral and his deputy shall not meddle with any thing *but only things done upon the seas*, and quarrels (*querrelles*

their deputies shall not intermeddle from thenceforth of any thing done within the realm, but only of a thing done upon the sea, according as it hath been duly used in the time of the noble King Edward, grandfather to the said King Richard, our said lord the king, will and granteth, that the said statute be firmly holden and kept and put in due execution; and moreover the same our lord the king by the advice and assent of the lords spiritual and temporal, and at the prayer of the said commons, hath ordained and established, that as touching a pain to be set upon the admiral or his lieutenant that the statute and the common law be holden against them, and that he that feeleth himself grieved against the form of the said statute, shall have his action by writ grounded upon the case against him that doth so pursue in the Admiral's Court, and recover his double damages against the pursuant, and the same pursuant shall incur the pain of ten pounds for the pursuit so made if he be attainted.

(t) Abbott, 4th ed. 72, n. (p); and see *ante*, 307.

(u) *Ante*, this volume, 307; and see *Apollo*, 1 Hagg. R. 315.

(x) Per Sir William Scott in *The Hercules*, 2 Dodson's Ad. R. 367, 377.

(y) Per Sir William Scott in *Hercules*, 2 Dod. Ad. R. 377.

or disputes) there arising, and therefore the Admiralty Court has properly no cognizance of any contract, or any thing done within *the body* of any county either by land or by water (meaning rivers), nor strictly of any wreck of the sea, for that must be cast *on land* before it becomes a wreck; (z) and damages are recoverable for a wrongful suit in the Admiralty when it was not properly cognizable there. (a)

But as to *flotsam, jetsam* and *ligan*, the Admiral hath jurisdiction when they are in and upon the sea. (b) If part of any contract or other cause of action have arisen upon the sea, and part upon the land, then the common law excludes the Admiralty Court from its jurisdiction, for part belonging to one cognizance and part to another, the common or general law takes place of the particular, (c) and, therefore, though pure maritime acquisitions, which are earned and become due on the high seas, as *seamen's wages*, are proper objects of the Admiralty jurisdiction, even though the *ordinary* contract for them be made upon land, (d) yet in general, if there be *a contract made on shore or in a river in England*, and to be executed upon the seas, as a charter-party or covenant that a ship shall sail to Jamaica; or if a contract be made upon the sea to be performed *in England*, as a bond on ship board to pay money in London, these kind of mixed contracts belong not to Admiralty jurisdiction, but only to the Court of common law; (e) and it has been holden that the Admiralty Court cannot hold plea of any contract under *seal*. (f) But to these rules there are exceptions, and, therefore, we will consider more particularly the subjects of jurisdiction, which may be arranged under *three general divisions*, as 1. In cases of *tort*; 2. In cases of *contract*; and 3. The *general practice* or course of proceedings in the Admiralty Court, which may be considered as constituting part of its jurisdiction, and rendering it very frequently expedient to resort to this Court in preference to any other.

When observing upon the Ecclesiastical Court, we noticed

(z) 3 Bla. Com. 106. But see as to wreck *The Augusta*, 1 Hagg. Ad. R. 16; *ante*, vol. i. 100.

(a) 2 Hen. 4, c. 11.

(b) 5 Coke's R. 106.

(c) Co. Lit. 261.

(d) 1 Vent. 146; see further, *post*, 520,

Seaman's Wages.

(e) Hob. 12; Hale's Hist. C. L. 35. In *Ousten v. Hebden*, 1 Wils. 101, Lee, C. J. said, "generally speaking the Court of Admiralty has no jurisdiction of matters of contract done or made at land."

(f) Hob. 212.

CHAP. V.
SECT. XI.

the ancient jealousies of the courts of law against all the Courts at Doctors' Commons, including the Admiralty Court, but which have happily long subsided. (g) And so far from the judges of the Court of Admiralty now attempting to extend their jurisdiction, we find a contrary disposition prevails; (h) and especially the Court reluctantly interferes when the *right* or *title* (as to a ship) is the direct *question* to be determined; (i) and the Court is also reluctant to interfere when a more comprehensive suit connected with the cause is pending in the Court of Chancery, (k) though it will decide upon a mate's claim to wages against a person who has assumed to act as owner or employed him, although there be a more extensive suit in Chancery depending between contending owners to the actual property in the ship. (k)

Appeal now to the Judicial Committee of the Privy Council.

Formerly from the sentence of the Admiralty judge the appeal was to the Delegates, and then by special leave to a commission of review; but now, as those Courts of Appeal are abolished, the appeal is to the Judicial Committee of the Privy Council under the recent statute, (l) the provisions of which will be presently fully considered.

1. Jurisdiction of the Court of Admiralty in cases of *torts*.

1. The jurisdiction of the Court of Admiralty in cases of *torts* is confined to *torts* committed *at sea*, or at least committed on the water and within the jurisdiction of the Court of Admiralty, and are principally suits for, 1. *Sea batteries*; 2. For *collision of ships*; 3. For *restitution of possession of a ship* where there is no *bonâ fide* claim for withholding it; and 4. Suits for *piratical and illegal takings* at sea.

1. Suit for a sea battery.

A suit may be instituted in the Admiralty not only by a *sailor* or other officer or person employed on board a ship during a voyage, against the captain or master, or other person on board the same ship, or against a person on board another ship, for an assault and battery, but even by a *passenger* against the master, when the injury was committed during a voyage or on the high seas. (m) In Courts of law, upon a special affidavit of a serious battery, and that the party who committed

(g) *Ante*, 307; and Abbott's *Laws of Shipping*, 4th ed. 72, n. (p).

(h) See cases in notes *infra*; and per Sir William Scott, 4 Rob. 75, 76.

(i) Per Lord Stowell in *Pitt*, 1 Hagg. Ad. R. 243, 244.

(k) Per Lord Stowell in *St. John*, 1 Hagg. Ad. R. 337.

(l) 3 & 4 W. 4, c. 41, *post*. "The Judicial Committee of the Privy Council."

(m) *The Ruckers*, 4 Rob. 73.

it is about to leave the kingdom, a judge will sometimes make an order to hold the party to bail, and he will be arrested and obliged to find bail, and the action will be tried by a jury, and that in the usual course. But if an order to hold to bail should be refused, then it may be preferable, when the party guilty of the battery is the owner or master of the vessel on board which the battery was committed, to proceed in the Court of Admiralty, when it is of course to issue a warrant to *arrest* the master, and he may be compelled to find *bail*, (as for instance to the amount of £300 or other sum,) and thereupon the plaintiff is to *libel* the defendant in that Court, and the judge, after examining the evidence, may himself award damages, or he may, if he think fit, convene a jury to *assist* him, (o) and the successful party is entitled to costs. (p) In a case of this nature the libel should not impute to the master or owner any *criminal* charge, as an imputation of subornation of perjury, and if it do, it must be erased. (q) In a similar suit by a mariner against the master, Lord Stowell adjudged £120 and expenses of the suit; and that case establishes that a suit in this Court, when the witnesses are staying in this country only a short time, is preferable to an action in a Court of Law, and this, notwithstanding the assistance of the recent enactment enforcing the examination of witnesses on interrogatories when they are about to leave the kingdom. (r) In such a suit an exceptive allegation may be admitted, viz. that a witness who had sworn to the battery had since deposed before a magistrate in a manner confessing his previous perjury, and that he has since gone abroad. (s)

A suit may also be instituted with advantage in this Court for *damage* occasioned by *one ship running foul of another*, (t) although it is more usual to proceed by action in the temporal Courts. There are some peculiarities and advantages attending a suit in *this Court*, which may render it sometimes preferable to proceed here, though when it is expected that there will be much contrariety in the evidence and some difficulty in eliciting the truth, the advantage arising from the examination of witnesses *viva voce* before a jury may render it advisable to proceed by action. The owner of a damaged vessel may in-

2. Suits for collision of ships.

(o) *The Ruckers*, A.D. 1801, 4 Rob. A.D. 1825.
73, 74, n. (a).

(p) *Ibid.* 76, n.

(q) *Ibid.* 76.

(r) *Enchantress*, 1 Hagg. Ad. R. 393,

(s) *Centurion*, 1 Hagg. Ad. R. 162.

(t) See full observations of Lord Stowell in *Dundee*, 1 Hagg. Ad. R. 109, 121.

CHAP. V.
SECT. XI.

stitute a suit in the Instance Court against the owners of the vessel that occasioned the damage, to recover compensation and costs; and if the question to be examined should depend much upon technical skill and experience in navigation, the parties may, with the permission of the judge, apply for and obtain the assistance of two or more *Trinity Masters*, who will, at the request of the Court, after hearing all the evidence on each side in open Court, at the desire of the judge, state the impression which the evidence has made upon them as to which of the ships or parties was to blame and in what respects; whereupon the judge, so assisted, will form his own independent judgment and decide accordingly. (u) In the case of the *Woodrop, Sims*, (x) Sir Wm. Scott thus distinctly stated the legal classification of collisions of this nature. "There are *four* possibilities under which an accident of this sort may occur. In the *first* place it may happen without blame being imputable to either party; as where the loss is occasioned by any other *vis major*, in that case the misfortune must be borne by the party on whom it happens to light; the other not being responsible to him in *any* degree. *Secondly*, a misfortune of this kind may arise where *both parties are to blame*, where there has been a want of due diligence or of skill *on both sides*, in such a case the rule of law is that the loss must be *apportioned between them*, as having been occasioned by the fault of both of them. *Thirdly*, it may happen by the misconduct of the *suffering party only*; and then the rule is that the *sufferer* must bear his own burthen. *Lastly*, it may have been the fault of the ship which ran the other down, and in this case the *injured party* would be entitled to an entire compensation from the other." It is further a general rule that "the law imposes upon the vessel having *the wind free*, the obligation of taking proper measures *to get out of the way* of a vessel that is *close hauled*, and of shewing that it has done so, and if not, the owners of it are responsible for the loss which ensues. (x) It frequently happens in cases of this kind that there is great discordance of evidence as to the facts upon which the Court has to form its decision. The testimony of the witnesses is apt to be discoloured by their feelings and by the interest which they take in the success of the cause, and the Court too frequently has to decide upon great diversities of statement as to the courses the vessels were steering, or the quarter from which

(u) *The Thames*, 5 Rob. 345 to 349.

(x) *The Woodrop, Sims*, 2 Dods. Adm. R. 85.

the wind was blowing, at the time when the accident occurred. In these cases the course of proceeding in Court is for the witnesses on each side to give their testimony, which is considered by two, at least, Trinity Masters, who assist the Court and state their opinion upon the testimony which vessel was to blame, and then the admiralty judge gives judgment. In a cause of collision against a *steam vessel*, the Court, assisted by Trinity Masters, pronounced for damages and costs, holding that a steam vessel, not receiving her impetus from sails, but from steam, is or ought to be more under command, and manifestly having seen the other vessel, was to blame. (z) It should seem that usually *steam boats* should generally go to the *starboard*; (z) whilst the general rule of navigation is, that when other ships are crossing each other in opposite directions, and there is the least doubt of their going clear, the ship on the *starboard tack* is to persevere in her course, while that on the *larboard* is to bear up or keep more away from the wind.

When it is doubtful which vessel was to blame, or whether such a degree of blame may not be imputable to each as to render it difficult to decide who, if either, ought to make compensation, then it seems to be preferable to proceed in the Court of Admiralty, because if it should then appear that the navigators of both the ships were equally to blame, but that only one was materially damaged, this Court has a peculiar and singular jurisdiction, to decree that the owners of each vessel shall make good a moiety of the entire damage, (a) although in a Court of *law*, when the mischief done was the result of the combined neglect of both parties, both are in *statu quo*, and neither could recover any compensation from the other. (b)

When the ship that has occasioned the damage is *foreign*, or the owner or person to be sued resides abroad or is insolvent, so that a verdict at law for damages might not be enforced, it is certainly preferable to proceed in this Court, because here, by the usual course of proceeding, the suit is initiated by *arrest of the ship, tackle*, apparel and furniture; and the security of such property will not be removed excepting upon the terms of adequate *bail* to answer for the liability of the stores as well as of the ship; (c) and the statute 1 & 2 G. 4, c. 75, allowing a *summary proceeding* and *arrest* of a ship in case of collision, extends as well to foreign as to British ships, and so does the

(z) *Shannon*, 2 Hagg. Adm. R. 173.

Exchequer, 85.

(a) *Ante*, 514; *Hay v. Le Neve*, 2 Show. 401 to 405.(c) Per Lord Stowell, in *Dunder*, 1 Hagg. Adm. R. 124, 125.(b) *Vernal v. Gardner*, 3 Tyr. Rep.

CHAP. V.
SECT. XI.

Pilot Act, 6 G. 4, c. 125, s. 55, protect the owner and master of a foreign ship from liability, when he has duly conformed to that act by taking a regular pilot on board. (d) But if a collision take place in a river, or within *the body* of any county, then no suit in the Admiralty Court would be sustainable, but that Court on protest would decline to interfere, or a prohibition from the King's Bench might be issued. (e) In suits for collision the crew of the ship charged with the damage are admitted as *witnesses* from necessity. (f)

3. In a suit for
possession of a
ship.

3dly. To a limited extent the Instance Court has jurisdiction, upon a suit instituted therein, to put a claimant, having a clear and indisputable title, into *possession of a ship*, independently of cases between *part-owners*, presently noticed. (g) Sir Wm. Scott, in a modern case, stated the history and limits of this jurisdiction. He observed, "it is certainly true that this Court did formerly entertain *questions of title* to a much greater extent than it has lately been in the habit of doing. In former times, indeed, it decided without reserve upon all questions of disputed title which the parties thought proper to bring before it for adjudication. After the Restoration, however, it was informed by other Courts, that such matters were not properly cognizable here, and since that time it has been very abstemious in the interposition of its authority. However, the jurisdiction over causes of *possession* was still retained, and although the higher tribunals of the country denied the right of this Court to interfere on mere questions of disputed *title*, no intimation was ever given by them that the Court must abandon its jurisdiction *over causes of possession*. If a question of *title* occur incidentally in a cause of possession, it then becomes necessary for the Court to inquire into the title, at least so far as to satisfy itself that it may safely decree possession to the party seeking it. The mere averment by one of the parties that there is a conflicting claim of title, which may be perhaps a mere *cobweb title*, does not arrest the progress of the cause, but the Court may so far inquire into the pretended title, as to ascertain whether it be bona fide founded on probabilities or merely colourable, and if the latter, the Court may decree possession to the other party." (h)

(d) *Christiana*, 2 Hagg. Adm. R. 183.

(e) *Public Opinion*, 2 Hagg. Adm. R. 398.

(f) *Catherine of Dover*, 2 Hagg. Adm. R. 145.

(g) *The Warrior*, 2 Dods. Adm. R. 288;

post, 517, 518.

(h) *Id.* 288, 289. This doctrine, that a mere colourable assertion is not to preclude a justice of the peace or the Court from proceeding, is adopted at law as in the instance of church rates, ante, 473.

By the very learned judgment of Sir W. Scott, it appears that the Court of Admiralty has authority to entertain a *civil* suit or intervening claim for the *restitution* of goods, (technically called for the *point of restitution*,) taken *piratically* on the high seas or *otherwise* than under colour of capture. (i) He observed, "now that this Court had *originally* cognizance of all *wrongs*, in short, of all transactions civil and criminal upon the high seas in which its own subjects were concerned, is no subject of controversy, for all history of English law supports it. In the reign of King Henry VIII. (28 H. 8, c. 15,) its *criminal* jurisdiction was in a great part removed by statute to a *mixt* commission, where it still continues to reside, and under which separately *criminal offences* at sea are still tried and decided. But that was the *only part* so removed, and the civil cognizance over *piracy*, which was not a *felony* at common law but only a *mis-demeanour* not merging the civil remedy, remained cognizable in and remediable by this Court, especially in favour of the suits of foreigners. And if goods are taken *piratically* at sea, though sold afterwards at land, the Court of Admiralty here has cognizance thereof and may award restitution to the original owner, as well against the original spoliator as against the purchaser," (k) and even without a previous conviction of the piracy, the original owner may proceed in a suit for restitution. (l) In case, therefore, of an illegal taking of a ship or goods at sea or abroad, a British subject or a foreigner may, on application to this Court upon attestations, move for and obtain a warrant of arrest of the property in a cause of piracy civil and maritime, or of its proceeds, in a cause of spoliation civil and maritime. (m)

CHAP. V.
SECT. XI.

4. In a suit for the restitution of goods *piratically* or *illegally* taken on the high seas not as prize in lawful war.

2. The jurisdiction of the Court of Admiralty in cases of *contracts*, express or implied, when they are of a *maritime* nature, is also extensive, as 1st, Between *part-owners* of a ship; 2dly, Suits for *mariners'* and *officers' wages*; 3rdly, Suits for *pilotage*; 4thly, Suits on *bottomry bonds* and *respondentia bonds*; and 5thly, Suits for *salvage* and relating to *wreck*.

2. Jurisdiction of Court of Admiralty in cases of *contracts* express or implied.

1. The jurisdiction of the Court of Admiralty between *part-owners* of *British* ships is in some respects concurrent with that of the Court of Chancery, and in many cases preferable, though in others not so. When the extent of the shares of several co-

1. Part-owners of a ship. (n)

(i) *The Hercules*, 2 Dodson's Ad. R. Inst. 152.
369.

(k) *Id.* 371 to 377, *Egglefield's Case*, 1 Vent. 173; 2 Keb. 828; *Pelaye's Case*, Bulst. 327; 4 Inst. 152.

(l) 3 Bulst. 27; *R. v. Marsh*, and 4

(m) *The Hercules*, 2 Dodson's Ad. R. 368, 377.

(n) See observations of Sir C. Robinson as to part-owners of a ship in general, 2 Hagg. Ad. R. 276 to 281.

CHAP. V.
SECT. XI.

owners of a ship is fixed or agreed, the Court of Admiralty is, we have seen, (o) open *all the year round* to an application by one or more of several *part-owners* to restrain the others, whether they constitute a *majority* or an *equal* number in interest, from sending the ship on a voyage without the consent of the applicant, until they have given *adequate security* to the extent of the value of the interest of the applicant opposing such voyage, and so as to secure him in case the ship should not safely return, (p) at least to *some* port in England; (q) and previous to taking the security, the value of each agreed share may be ascertained by the marshal of the Court, and which may on affidavit be impeached and increased so as to obtain higher security; (r) and if the ship should be *lost* the Court of Admiralty would *immediately* enforce the payment of the stipulated sum with costs, without regard to any other disputed account between the owners; (s) though possibly if it could be shewn that the applicant had occasioned the loss, that circumstance might induce the Court to suspend adjudication of immediate payment. (t) The applicant, in such a case, will not be liable to any part of the expenses of the *outfit*, nor on the other hand will he be entitled to any *earnings* of the ship during the voyage. (u) We have seen that applications of this nature are considered not to be advisable excepting in cases of long voyages, and not to be expedient when only short or coasting voyages are proposed; however there may be exceptions. (x) An application of this nature may not only be made against an *admitted part-owner*, but also by a claimant of an entire vessel or share against a person whom he insists has no interest and is a mere wrong-doer. (y)

The *course of proceeding* is to obtain a *warrant to arrest* the ship, whereupon, unless the required security be given, she will remain secured in port. (z) If no security be given, then the only course is to file a bill in equity to compel an arrangement between the owners; for the Court of Admiralty has no power over the accounts relative to the ship or to decree a sale of the shares, and it has indeed been supposed that even the Court of Chancery has no such power. (a) If the *minority* happen to

(o) *Ante*, vol. i. 717.

(p) Per Lee, C. J., *Ousten v. Hebden*, 1 Wils. 101; Abbott, 4 ed. 74, 75, and per Ld. Stowell in *Apollo*, 1 Hagg. Ad. R. 306, 311. But in the *Egyptienne*, *Parkmans*, 1 Hagg. Ad. R. 346, a decree of possession was refused to a mere moiety owner.

(q) *Margaret*, 2 Hagg. Ad. R. 275.

(r) *Ib.* in notes.

(s) *Apollo*, 1 Hagg. Ad. R. 306 to 320.

(t) *Ib.* 316, 317.

(u) *Anon.* Chan. Cas. 36; *Boyon v. Sandford*, Carth. 63; Abbott, 71.

(x) *Ante*, vol. i. 717, 718.

(y) *Blanchard*, 2 B. & C. 244; 3 Dowl. & R. 177, S. C.

(z) Abbott, 71.

(a) *The Margaret*, 2 Hagg. Ad. R. 277; but see *ante*, vol. i. 718.

have possession of a ship and refuse to employ it, then the majority also may by a similar warrant obtain possession of it, and send it to sea upon giving such security. (b) But after a decree of possession, and such decree had been executed, the Court of Admiralty declined to interfere further by attachment, on the ground that the decree had been only *formally* and not beneficially complied with, and left the complaining part-owner to seek his remedy for perfect possession elsewhere, i. e. in Chancery; and therefore it would seem, that in such disputes and hostile cases a proceeding in a Court of Equity is a more complete remedy. (c)

If the amount of the respective shares be a subject in dispute, (i. e. whether the claimant be entitled to a third, or fourth, or other share, and not merely the *value* of a share,) then the Court of Admiralty will not interfere, and the proper course is to file a bill in Chancery and pray an injunction, restraining the sailing of the ship till the amount of the share, for which security is to be given, shall have been ascertained, and which will probably be referred to a master in Chancery. (d)

An application, either to the Court of Admiralty for security or to the Court of Chancery for an injunction, should be made *promptly* or it will not succeed. (e) But if promptly made it will not be refused, and an injunction may be obtained in five days or less. (f) But the Court of Admiralty does not interfere in cases of *adverse title*, or in favour of a mortgagee of a ship who has neglected to take possession; (g) and the Court of Admiralty will not entertain a suit of this nature between *foreign* owners of a foreign ship, because the foreign law frequently varies from the English law; (h) unless the ambassador or representative of the foreign state has consented to the proceeding. (i)

Nor has the Court of Admiralty any jurisdiction to compel the *sale* of a share in a ship, and if the enforcement of such sale should form part of the object of a suit in that Court, the Court of King's Bench would *pro tanto* grant a prohibition. (k) Nor has this Court any jurisdiction as regards the settlement of *accounts* between part-owners or partners. (l)

(b) Abbott, 72.

(c) *John of London*, 1 Hagg. Ad. R. 342; *The Margaret*, 2 Hagg. Ad. R. 277.

(d) *Haly v. Goodson*, 2 Meriv. 77; Abbott, 75; *ante*, vol. i. 716.

(e) *Christie v. Craig*, 2 Meriv. 137; *ante*, vol. i. 717.

(f) *Apollo*, 1 Hagg. Ad. R. 307; *ante*, vol. i. 717.

(g) *Christiana*, 2 Dodson's Ad. R. 183.

(h) *Joham v. Seigmard*, 1 Edw. Ad. R. 242.

(i) *Lee Renter*, 1 Dodson's Ad. R. 22.

(k) Per Lec, C. J., in *Ouston v. Hebden*, 1 Wils. 101; Abbott, 74.

(l) Per Ld. Stowell, *Apollo*, 1 Hagg. Ad. R. 313.

CHAP. V.
SECT. XI.

2. Suits for mariners' wages. (m)

2. Although *mariners' wages* are recoverable by action at law, (n) and by other more summary means, (o) yet the *Court of Admiralty* is in many cases the preferable tribunal, particularly when there are *several* seamen unpaid, or where the owners of the vessel are insolvent; for "all the seamen and officers, excepting the captain or master of a British vessel, may either *singly* or *jointly* sue in *this* Court, and *may arrest the ship by its process as a security for their demand*, or the proceeds remaining in the registry;" and they may also cite the master or the owners *personally* to answer their suit in this Court, and this although their wages were contracted for by the usual ships' articles in England. (p) It was so decided, as regards a written agreement for wages signed in England before any enactment; (q) and as well the statute requiring a written agreement in the case of a *foreign* voyage, (r) as that which requires such an agreement in cases of certain vessels employed in the *coasting* trade, (s) contain a clause that no seaman shall, by signing such agreement, be deprived of any means of recovery of wages against any *ship*, or the master or owners, which he then had; and the Court of Admiralty being a Court of Equity does not consider the words in the ship's articles "*binding and conclusive*," in 2 G. 2, c. 36, sec. 2, as applicable to mariners' contracts of a special nature, and they are to be construed most liberally and equitably in favour of seamen, so notoriously ignorant and careless of technical enactments. (t) It has been observed that suits for wages due to mariners of our own country have been said to be entertained by the Court of Admiralty more from a kind of *toleration*, founded upon the general convenience of the practice, than by *any direct jurisdiction properly belonging* to it, although the exercise of such a jurisdiction had existed from the very first establishment of such a Court (u). But if there be a formal and special contract out of the usual form, and by *deed*, then a prohibition might be obtained if applied for in *due time*, so as to prevent the suit on such *deed* from being prosecuted in the Admiralty

(m) We shall not here attempt to state the whole law relative to seamen's wages, and when or not they are forfeited by *desertion*, &c., for which see *ante*, vol. i. 73, 74; Abbott on Shipping, and Haggard's and Dodson's Admiralty Reports, Indexes, tit. Wages.

(n) 3 Bos. & Pul. 102, *Young v. Nicholas*, 1 Hagg. Ad. R. 201.

(o) 59 G. 3. c. 56.

(p) *Ragg v. Kings*, 2 Stra. 858; 1 Barnard. 297; *Clay v. Snellgrave*, Salk. 33; 1 Ld. Raym. 576; 12 Mod. 405;

Carth. 518; *Read v. Chapman*, 2 Stra. 937; *The Favorite de Jersey*, 2 Rob. R. 232; *Bins v. Parre*, 2 Ld. Raym. 1206; 1 Holt on Shipping, 462; Abbott, 476.

(q) *Bins v. Parre*, 2 Ld. Raym. 1206; *Mariners' Case*, 8 Mod. 379; Abbott, 478.

(r) 2 G. 2, c. 36, s. 8.

(s) 31 G. 3, c. 39, s. 6; Abbott, 478.

(t) *Minerva*, 1 Hagg. Ad. R. 356, 357.

(u) Per Sir W. Scott, *The Courtney*, 1 Edwards' Ad. R. 240.

Court, unless there have been fraud or deceit; (x) and no Court of Admiralty has jurisdiction over cases of seamen's wages when founded on special and extraordinary contracts, as to be paid part in the produce of a whaling voyage. (y)

Seamen's wages constitute so effectual a charge *upon the vessel*, that the Court of Admiralty may enforce payment of wages earned by a British mariner under a contract with the British owner of a ship, although the ship itself, previous to its return to this country, may have been transferred to a foreigner in a distant part of the world, especially if the transfer was merely colourable; and this notwithstanding the seamen had executed bonds not to require the wages abroad, nor unless the ship returned to England. (z) And the circumstance of a vessel being employed as a post office packet constitutes no protection from arrest in a suit for mariners' wages, especially if the post office raise no objection to the proceeding as injurious to the interests of the public; (a) and if the ship has been disposed of, and its proceeds remain in the registry of the Court, then the suit may be against such proceeds. (b) It should seem also that although a ship may be in custody of the sheriff under a *fiery facias*, yet the seamen or the mate and several of them may institute a suit for their wages in the Court of Admiralty and have the vessel arrested under a warrant issued from that Court, so as at least to prevent any surplus that would otherwise be paid to the owner from being paid over to him, but still subject to the just claim of the execution creditor; and the Court of King's Bench will not grant a rule calling on the marshal of the High Court of Admiralty to pay over the amount of the sum indorsed on the writ of execution to be levied, though the Court of Admiralty itself, or the Delegates, (or now the Judicial Committee of the Privy Council,) would decree to that effect. (c)

Seamen are not confined in their suits in the Admiralty Courts merely to actual service *at sea*, but may also proceed there for their wages earned in rigging and fitting out a ship for a voyage. (d) They may also sue here for wages of a coasting voyage, or for navigating a vessel from one part of England to another; (e) and if the subject come collaterally before this

(x) 1 Edwards' Ad. R. 240, note (e);
2 Dods. Ad. R. 12; Abbott, 480, 483.

(y) *The Sydney Cove*, 2 Dods. Ad. R. 11.

(z) *Juliana*, 2 Dods. Ad. R. 504.

(a) *Lord Hobart*, 2 Dods. Ad. R. 100.

(b) *Sydney Cove*, 2 Dods. Ad. R. 11.

(c) *Flora*, 1 Hagg. Ad. R. 298.

(d) *Wills v. Osman*, 2 Ld. Raym. 1044; 6 Mod. 238; Sayer, 127.

(e) 1 Vent. 343.

CHAP. V.
SECT. XI.

Court in a suit in other respects properly instituted there, the Court may decide whether a place at which a ship has arrived was such a determination of the voyage as to entitle the seamen to wages. (*f*)

Foreign seamen, whose ship is in a British port, may institute their suit against such ship or owner for wages in the Admiralty Court here, with the same advantages as British seamen, but not so if they were hired under a special contract referring to their own foreign law, especially if that law or their own stipulation precludes them from suing their captain for wages elsewhere than in their own country. (*g*) It is usual however in the case of foreign seamen instituting a suit for wages in this Court against the ship and owners, to obtain and verify the consent of the foreign ambassador or consul. (*h*) But the Admiralty Court here will not entertain a suit for three months' wages in advance in a foreign port under a particular stipulation to that effect. (*i*)

As instances of such suits being sustainable by *officers* besides the *ordinary seamen*, (*k*) are suits by boatswains, (*l*) ships' carpenters, (*m*) surgeons, (though recently doubted,) (*n*) or the chief or other mate; (*o*) and a mate, who during a voyage became master by the capture of the former master, was allowed to sue in this Instance Court for his wages *as mate* for the whole time, on the ground that his rights as mate were not merged, though as to any additional remuneration after he became master that must be recovered in a court of law; (*p*) and if a second mate, pending a voyage, succeed to the office of chief mate, his wages are to increase accordingly, and an alteration in the ship's articles is not absolutely necessary to support his title. (*q*) And a suit in the Court of Admiralty may be sustained for subtraction of wages, by a mate against persons who had represented themselves to him as owners of the ship, although there was a pending suit in chancery respecting a

(*f*) *Brown v. Benn*, 2 Ld. Raym. 1247.

(*g*) *The Courtney, English*, 1 Edws. Ad. R. 239; *Johnson v. Mackielson*, 3 Campb. 46; *Dickman v. Benson*, *ibid.* 290; 1 Holt, 464.

(*h*) *Frederick*, 1 Hagg. Ad. R. 138, 140, and cases there cited; *The Courtney*, 1 Edws. Ad. R. 239.

(*i*) *Courtney*, 1 Edws. Ad. R. 239.

(*k*) *Abbott*, 476.

(*l*) *King v. Rogg*, 2 Stra. 858; 1 Barnard. 297.

(*m*) *Wheeler v. Thomson*, 1 Stra. 707;

see observations of Sir W. Scott, the *Lord Hobart*, 2 Dods. Ad. R. 104.

(*n*) *Mills v. Long*, Sayer, 136, *sed quare*; see *Lord Hobart*, 2 Dods. Ad. R. 104, 105, and note.

(*o*) *Bayley v. Grant*, 1 Ld. Raym. 652; Salk. 33; *Read v. Chapman*, 1 Ld. Raym. 937; *The Favorite*, 2 Rob. 237; *Robinett*, *ibid.* 261; *The Lord Hobart*, 2 Dods. Ad. R. 104.

(*p*) *The Favorite*, 2 Rob. R. 252; *The Batavia*, 2 Dods. Ad. R. 503.

(*q*) *Providence*, 1 Hagg. Ad. R. 391.

contest who were really entitled as owners. (r) And a *female* who assumes the garb and appearance of a sailor, and is hired as such, may, in the absence of fraud, recover stipulated or reasonable wages precisely as a male seaman. (s)

But it has been repeatedly decided that a *master* of a vessel cannot proceed for his wages in this Court, because he is supposed to stand on the security of his personal contract with his owner, not relating to the bottom of the ship. (t) But even in the case of the master, if he have obtained a sentence in the Court of Admiralty upon the usual allegation stating that he was hired within the jurisdiction of that Court, the Courts of Westminster Hall will not prohibit the execution of the sentence, for the motion for a prohibition should have been made at an earlier period. (u) If a *master* of a ship improperly sue in the Admiralty Court for his wages, and thereupon a prohibition issue upon a suggestion that the contract for wages was made *on land*, the Court of King's Bench will not compel the defendant to find special bail to the action in that Court. (x)

In a mariner's suit for wages every question of right to the same and of *forfeiture* thereof by *desertion*, (y) *mutiny*, or insolent expressions and acts of mutinous tendency not apologized for, (z) may arise, and be discussed and determined in this Court, some of which we have adverted to, and we have seen that a master not providing adequate food is a sufficient cause for leaving the vessel without forfeiting wages. (a) A single act of intemperance or misconduct will not in general forfeit the wages even of a mate or other ship's officer, it must be a *habit* to produce that effect; (b) and *impressment* is not equivalent to desertion unless collusively obtained, and the mariner is entitled to wages for the time he actually served, and indeed for the whole time, if he can prove that the master maliciously caused him to be impressed. (c) In a suit by a mate for wages it has been recently decided, that if a part of the cargo has been lost by his negligence or improper interference, the owners

(r) *St. John*, 1 Hagg. Ad. R. 334.

(s) *Jane and Matilda*, 1 Hagg. Ad. R. 187, where Lord Stowell gives a spirited detail of the valuable public services that have been performed by females.

(t) Per Sir W. Scott, in the *Favorite*, 2 Rob. 237; Bac. Abr. Prohibition, B.; *Clay v. Mulgrave*, 3 T. R. 315; *Welthinson v. Ormsly*, *ibid.*

(u) *Barber v. Wharton*, 2 Ld. Raym. 1452; *Buggin v. Bennett*, 4 Burr. 2035; *Abbott*, 479, 480; 1 Holt, 463.

(x) Bac. Abr. Prohibition, B; *Clerk*

v. Mulgrave, 3 T. R. 315; *Welthinson v. Ormsly*, *ibid.*

(y) *The Amphitrite*, 2 Hagg. Ad. R. 403; *The Jupiter*, 2 *id.* 221.

(z) *The Susan*, 2 *id.* 229, in n.; *The Amphitrite*, 2 *id.* 403.

(a) *Castiliu*, 1 *id.* 59; *Bulmer*, *id.* 163; *Jane and Matilda*, *id.* 187; *ante*, vol. i. 73, 74.

(b) *The Exeter*, 2 Rob. 264; *Malta*, 2 Hagg. Ad. R. 168.

(c) *The Jack Park*, 4 Rob. 308; *The Amphitrite*, 2 Hagg. Ad. R. 403.

CHAP. V.
SECT. XI.

may deduct the amount from his wages, (*d*) though we have seen that the common law does not in general allow any deduction from a servant's wages on account of breakage or damage committed by such servant. (*e*)

In a suit of this nature against the ship *in specie*, if the value thereof be insufficient to discharge *all* the claims upon it, then the *seaman's* claim for his *wages* is preferred before all other charges. (*f*)

(*d*) *The New Phoenix*, Admiralty Court, 14 Feb. 1833. This was a question of some interest as regards the responsibility of seamen to make good damage done by them, by accident or negligence, to goods forming part of the freight of the vessels to which they might belong.

The *King's Advocate* said he appeared on behalf of the mate of the *New Phoenix*, for the subtraction of wages due to him for his services. The mate was engaged to proceed with the vessel to Jamaica, to take in a cargo, and the question was, whether he was liable for the loss occasioned by an accident that had happened to a hogshead of sugar, which had, while being conveyed from the wharf to the ship's boat, fallen overboard in Jack's-bay, Jamaica? The owners had refused to pay the wages due to the mate, and the present action was commenced. The learned advocate stated the facts, and contended that, as a mere accident had happened, the mate ought not to be responsible and incur the loss of his wages. There was no charge of improper conduct on the part of the mate.

Dr. Addams, for the owners, contended that the Court must arrive at the legal conclusion, and if the owners did not succeed in this case, it would be almost impossible for owners of vessels to protect themselves from the consequences of the negligent conduct of seamen. The principle of law adopted by the Court was, that if merchants claimed of the owners satisfaction for damage done to goods in their custody on freight, the owners had a right to deduct the amount of loss from the seamen's wages. His learned friend had argued that this was a case of accident, but he should contend that it was a case of negligence, and the Court knew perfectly well that accidents were generally occasioned by negligence. He was ready to admit there was no *malus animus* in this case, but, by the negligence of the mate, the hogshead of sugar had fallen into the sea, while it was being hoisted into the ship's boat, in the absence of the wharfinger, who would have been responsible for the damage had he been present, and it being a rule in Jamaica not to remove goods in the absence of this responsible person. He (Dr. Addams) referred to the evidence in the cause, and felt

assured that the Court would consider that the mate ought to bear the loss incurred by the damage done to the sugar.

Sir C. Robinson said this was a case in some degree novel, and he did not understand that it had before been raised by any one. It is one of that class of cases, however, which, though it did not involve any considerable amount of property, was one of considerable importance with regard to the principle which, for the interest of navigation, was generally preserved within very strict rules. The conduct of those who had the care of ships and goods on board was matter the Court should strictly guard. This principle ran through all the maritime law of the country at all times. On the admission of the allegation he had expressed himself that by nothing short of the grossest negligence could the owners hope to establish their case; but the sense in which he applied that term, as compared with misconduct, differed where parties had disregarded the general rules that ought to have been observed. All the evidence shewed that it was not the custom of the trade, in the absence of the wharfinger, who was held responsible for the safe delivery of goods on board ship, to remove any merchandise. The evidence shewed that this responsible person was absent, and he should be disturbing the rules of navigation if he did not maintain them. It was argued that the occurrence was a mere accident, but the mate should have considered his duty to other parties, and not have disturbed the responsibility of the law, which was on the wharfinger. It might be said the owners had acted illiberally; that was no business of the Court's; for the interests of commerce it was necessary to protect the principle of law that the owners of vessels are entitled to deduct the losses occasioned by seamen by their negligent conduct. The question had been tried to establish the principle. He considered the owners had a right to deduct the loss from the wages of the mate.

Dr. Addams applied for costs, but the Court said it could not grant the application.

(*e*) *Ante*, vol. i. 78, note (*e*); and *Le Loir v. Bristow*, 4 Campb. 134.

(*f*) *Abbott*, 484; and see observations in *The Sidney Cove*, 2 Dodson's Ad. R. 13.

But suits in the Admiralty for wages, like actions at law, are particularly limited to *six years*, in the absence of any deed, with exceptions in favour of infants, femmes covert, and parties imprisoned. (g) Upon which it has been observed, that inasmuch as such suit affects the ship itself, which may have been afterwards purchased, the time allowed is much too long, and it would be advisable, at least as regards the process against the *ship*, to adopt the French ordinance, which allows only one year. (h)

In a suit for wages it is always essential to make a tender of a sufficient sum and of costs up to the time of tender, by *act of Court* and not merely by *verbal* tender to the party. (i) If the tender turn out to have been inadequate, and especially if there have been any attempt to attack the character of the claimant, as for inattention or mutiny, the Court will award liberal remuneration and all expenses. (k) The suit for seamen's wages, whether at the instance of one or several, may be by *summary petition*, and thereupon the owner or defendant in due time delivers in his *defensive allegation*. (l)

In a suit of this nature the master is a competent witness, and compellable to give evidence on their behalf, although he himself, as master, might be separately sued. (m)

Although we have seen that the value of damages occasioned by a mate or mariner to a part of the cargo may be deducted from his wages; (n) yet it appears to have been considered that neither under the statutes allowing a set-off at law or otherwise can a *set-off for a cross debt* be pleaded or offered as a deduction against a mariner's suit for wages; and, therefore, where a mate sued in the Admiralty Court for wages, and the owner pleaded a set-off for the passage-money of the mate's wife, the Court rejected such allegation and pronounced for the wages and costs. (o)

In an early part of this volume we adverted to Lord Stowell's observations on the duties of proctors when concerned for mariners or other parties in claims of this nature, especially as respects their *personal* interference in order to prevent litigation, or they may incur censure, and perhaps be obliged to pay costs. (p)

(g) 4 Ann. c. 16, s. 17, 18 and 19.
(h) Abbott, 484, 485, note (k).
(i) Per Sir Wm. Scott, *Vrouw Margareta*, 4 Rob. 106, 107.
(k) *Porcupine*, 1 Hagg. Ad. R. 378.
(l) *Minerva*, 1 Hagg. Ad. R. 347; *Harcourt*, id. 248; *Frederick*, *Neptune*, id.

212, 227.

(m) *Lady Ann*, 1 Edward's Ad. R. 235.

(n) *Ante*, 524, n. (d).

(o) *Lady Campbell*, 2 Hagg. Ad. R. 14, in note.

(p) *Frederick*, 1 Hagg. Ad. Rep. 219, 221, 225; *ante*, this volume, 23, 24,

CHAP. V.
SECT. XI.

Summary power
of a justice of
the peace to
decide upon a
claim of wages
not exceeding
20*l.* under 59
G. 3, c. 58. (q)

The statute, 59 G. 3, c. 58, empowers a justice of the peace, on the *complaint* of a seaman, to settle disputes about wages *not exceeding 20*l.**, and the decision of the justice or justices is to be final, unless an *appeal* to the Court of Admiralty is interposed by either party within *seven days* after the justice's order was made; and by sect. 2, *notice of appeal* is to be given in writing within *forty-eight hours* after the order of the justice is made, and a monition is to be taken out against the adverse party within *thirty days* from the date of such order, and *bail* in double the amount of wages claimed is to be given; and by sect. 4, seamen are not deprived of any other remedy to which they may resort. It has been held on this act, that in case of an appeal to the Court of Admiralty the appellant is to begin in that Court by setting forth his act and complaint on petition. (r)

3. Suits for
pilotage.

The Court of Admiralty has in some cases jurisdiction over questions of *pilotage*. The statute of 6 G. 4, c. 125, s. 87, expressly provides, that the provisions of that act shall not affect or impair the jurisdiction of the Court of *Load Manage* or High Court of Admiralty; but it was determined that a charge for pilotage under the old statute, where the service was performed in a *river* within the body of a county, could not be recovered by a suit in the Court of Admiralty. (s) Sometimes where a pilot has interfered to save a ship, it may be difficult to say whether he be entitled to salvage as well as pilotage; but generally speaking the services are quite distinct, and if a pilot without pretence claim salvage, his petition will be dismissed with costs. (t) Pilots are not entitled to charge as *lay days* the days on which they enter and on which they leave a place of quarantine. (u) But extra pilotage may become payable for extraordinary pilot service or even salvage. (x)

4. Bottomry
bonds. (y)

This Court also has a peculiar and unquestionable jurisdiction, (exclusively so as regards the proceeding *in rem* against the *ship itself*;) in case of *bottomry bonds* and other deeds of *hypothecation*, being in the nature of a mortgage of the ship, as a security for money lent or expended upon her, without reserving any claim against the owners in person, and usually made

(q) And see decision thereon, *Minerva*, 1 Hagg. Ad. R. 54.

(r) *Minerva*, 1 Hagg. Ad. R. 54, note †.

(s) *Ross v. Walker*, 2 Wils. 264.

(t) *The Joseph Harvey*, 1 Rob. 306.

(u) *The Bee*, 2 Dodson's Ad. R. 498.

(x) *The Enterprise*, *Crobbie* and *Columbus Nerroll*, 2 Hagg. Ad. R. 178, in notes.

(y) See jurisdiction of Admiralty Court over bottomry bonds, the *Rhadamanthe*, 1 Dodson, Ad. R. 203.

by the master abroad, and stipulating that the money advanced, together with the agreed premium, shall be paid within a stipulated number of days after the safe arrival of the vessel at a named port of discharge in England, (z) or, as it is said, should be conditioned for her safe arrival at *any* port within the admiralty jurisdiction. (a) To entitle the lender abroad to proceed against the ship itself, there must be a *written instrument of hypothecation*, and bills of exchange drawn by the master as a security for money advanced to him, though accompanied with a *verbal* engagement from him that the ship shall be liable, will not suffice. (b) The principle upon which bottomry bonds are sustained, although they in general reserve very high profit for the use of the money, is, that the loan is made entirely on the credit of the vessel when in a state of distress in a foreign country, and where the master has neither money nor funds nor personal credit. (c) When bona fide executed under such circumstances, the bond may be sustained in part although it may be invalid in other respects. (c)

Upon the arrival of the ship in this country, if the loan and premium be not paid within the time prescribed, the agent of the lender applies to the Court of Admiralty with the *bond* or other contract and a proper *affidavit* of the facts, and obtains a *warrant to arrest* the ship and *cite* all persons interested to appear before the Court; and such *citation* is generally made by posting a copy of the warrant upon some part of the ship. (d) If in the course of the proceedings it should become necessary to sell the ship, the Court will *decree a sale* to be made under the direction of its own commissioners, and will afterwards distribute the proceeds among the different claimants as justice requires; and this may be done if the owners or persons interested in the ship do not appear at the time appointed by the Court, otherwise their absence or default would occasion a failure of justice. (e) If there be *several* claimants of the same nature, though at law the *first* mortgagee of land is preferred and must be first satisfied, in this Court the *last* obligee is first to be paid, provided the advance was absolutely essential, on the principle that the last loan furnished the means of preserving the ship, and without it the former lenders might entirely have

(z) Form of bottomry bond, Abbott, 487, and the grounds of the Court of Admiralty jurisdiction over it. The *Rhadamanthe*, 1 Dodson, Ad. R. 203; *Alexander*, *id.* 278; *Atlas*, 2 Hagg. Ad. R. 48.

(a) *Alexander*, 2 Hagg. Ad. R. 278.

(b) 3 Ves. & B. 135; 19 Ves. 474; 2 Rose, 194, 229; Abbott, 126.

(c) See per Ld. Stowell, *Nelson*, 1 Hagg. Ad. R. 175.

(d) Abbott, 126.

(e) *Ibid.* 126, 127.

CHAP. V.
SECT. XI.

lost their security. (f) But unless it be established that the last loan was essential for the preservation of the vessel, the first security will be preferred. (g) And claims for *mariners' wages* are always preferred to bottomry bonds. (h) Although the lender's taking undue advantage of a ship's distress and exacting an exorbitant premium for the loan, cannot amount to usury on account of the principal being in risk; yet the Court of Admiralty has jurisdiction to *reduce* the stipulated premium; though in the exercise of such jurisdiction it will act with great caution and liberality. (i)

5. Suits and
proceedings for
Salvage. (k)

The Court of Admiralty has also extensive jurisdiction, as well *original* as appellate, from the decision of justices or arbitrators, in questions of *Salvage*, which is the compensation to be made to persons by whose assistance a ship, or its freight, or its loading, has been saved from impending peril or recovered after actual loss. (l) There are in general several modes of proceeding for salvage, viz. 1st. a claim and suit in the admiralty Court; 2dly, an action at law; 3rdly, some regulations extending throughout the whole kingdom, authorizing *three* justices of the peace or their nominee to award the amount of salvage, (m) and either party may, within ten days after such award, state his desire to obtain the judgment of the Court of Admiralty respecting the salvage, and thereupon the salvor must, within thirty days after the award, take out a monition and proceed in the Admiralty, and the owner is, upon good security, to have the possession of the property seized. (n) 4thly, Questions of salvage arising within the particular limits of the *Cinque Ports* are regulated by different statutes. (o)

In all cases the *right* to Salvage or the *quantum* may be tried by a jury in an *action* in a Court of law. (p) But if the salvage has been performed *at sea*, (q) or between high and low water

(f) *Bynkershook*, Quest. Jur. Pub. Lib. 1, c. 19; *Abbott*, 128.

(g) *Rhadomanthe*, 1 Dod. Ad. R. 201; *Betsy*, *id.* 289.

(h) *The Madonna D'Ibra*, 1 Dodson, Ad. R. 40; *The Sydney Cove*, 2 Dodson, Ad. R. 1. 13; *Duke of Bedford*, 2 Hagg. Ad. R. 294.

(i) *Cognac*, 2 Hagg. Ad. R. 377.

(k) See in general 3 Chitty's Com. Law, 440 to 445.

(l) *Abbott*, 397; what slight interference can scarcely be deemed salvage, *Henry*, 1 Hagg. Ad. R. 264.

(m) 49 G. 3, c. 122, s. 5 & 8, and 1 &

2 G. 4, c. 75, s. 4 & 7. See construction of the latter act in *Jonge Nicolas*, 1 Hagg. Ad. R. 201 to 210.

(n) 49 G. 3, c. 122, s. 10, and 1 & 2 G. 4, c. 75, s. 10.

(o) *Abbott*, 411; 1 & 2 G. 4, c. 76. See an instance of a successful appeal from an award of Cinque Port commissioners, *Henry*, 1 Hagg. Ad. R. 264.

(p) *Abbott*, 398.

(q) *Abbott*, 399. The jurisdiction of the Court of Admiralty extends in the *Thames* no higher up than Black Tail Sand, *The Hercules* cited in *The Eleanor*, 6 Rob. Rep. 39.

mark, (r) the Court of Admiralty unquestionably has jurisdiction over the subject and is enabled most satisfactorily to fix the sum to be paid without the intervention of a jury, and usually the judge acts with the assistance of one or more experienced persons, members of the Trinity House. (s) And this Court adjusts the proportions of salvage to be paid amongst the salvors, and the property is secured pending the suit, and if a sale be necessary such sale will be directed and the proceeds divided between the salvors and the proprietors according to equity and reason. (t) In fixing the rate of salvage this Court usually has regard not only to the labour and peril incurred by the salvors, but also to the situation in which they happen to stand with respect to the property saved, to the promptitude and alacrity manifested by them, and to the value of the ship and cargo, as well as the degree of danger from which they were rescued. (u) So in regard to the proportion of remuneration, there are many cases in which there is much labour and little to pay for it, so that the Court acts upon the principle of giving a *larger* proportion in cases of *small value* than in cases where the property is considerable, as a due encouragement to the interests of the commerce and navigation of the country. (x) Thus, one-sixth of the value of the ship and freight was allowed, both having been saved by the salvors, (y) so one-seventh, (z) one-tenth, (a) and two-fifths, (b) or even two-thirds, (c) where the crew had deserted the vessel; and even a *moiety*, in another case of capture and desertion and salvage with great risk, trouble, and discretion, was allowed; (d) but in no case it is said more than half. (e) In a late case, Sir W. Scott said, "It is the practice of this Court, when the property is of small amount, to award a *larger* proportion of the value of the ship and cargo; but where the property is of greater value the Court always conceives a less proportion is sufficient, and where it is of vast

(r) 1 & 2 G. 4, c. 75, s. 31; in *The Two Friends*, 1 Rob. R. 283, Sir W. Scott seems to suppose that the Instance Court may be ousted of jurisdiction by the salvors having been amused by negotiations as to the *amount* of salvage, until the goods have been landed and have then defied the jurisdiction of the Court of Admiralty: *sed quære* how such a fraudulent stratagem could have such effect. *Semble not*.

(s) As in *Mary Ann*, 1 Hagg. Ad. R. 158.

(t) Abbott, 399.

(u) Abbott, 489; *The William Beckford*, 3 Rob. 355; and see the principle of calculating remuneration, per *Ld. Stowell*

in *Mary Ann*, 1 Hagg. Ad. R. 158; *The Sarah*, 1 Rob. 313, in notes; *The William Beckford*, 3 Rob. 355, where the property saved was worth 17,604*l.* only 1300*l.* was allowed salvage.

(x) Per *Ld. Stowell* in *Mary Ann*, 1 Hagg. Ad. R. 160.

(y) *The Dorothy Foster*, 6 Rob. 88.

(z) *The Henry*, 1 Edward, Ad. R. 192.

(a) *The Trelawney*, 4 Rob. 225; *Mary Ann*, 1 Hagg. Ad. R. 158.

(b) *The Fortuna*, 4 Rob. 193.

(c) *The Jonge Bastianna*, 5 Rob. 322.

(d) *The Elliotta*, 2 Dodson, Ad. R. 75; the *Blendenhall*, 1 Dodson, Ad. R. 422, 423.

(e) *Frances Mary*, 2 Hagg. Ad. R. 89.

CHAP. V.
SECT. XI.

extent a moderate proportion may reasonably be considered as a competent reward ;”(f) and where the vessel and cargo saved were worth 275,000*l.*, only 4000*l.* salvage with expenses of the suit were awarded against the East India Company, and in these proportions, 2000*l.* to the owner, 500*l.* to the commander, and 1500*l.* amongst the rest of the officers and crew, in the same manner as prize proceeds would have been distributable amongst them.(g)

So by the law of England *King's ships* are entitled to a like salvage remuneration for services rendered to merchant vessels in distress, as other salvors, and this notwithstanding the crown may have a considerable interest in the revenue that would be received on the safe arrival of the ship, and in that respect it may be a duty of the crew of a king's ship to interfere more than indifferent persons ;(h) but it would be otherwise if the king's ships and merchant ships were at the time associated in a joint expedition.(i) It seems not to have been formally decided whether a foreign ship of war lying in a port of this country is liable to the civil process of the Court of Admiralty here, in a cause of salvage at the suit of British subjects.(k)

The crew of a vessel cannot have a sustainable claim for salvage *eo nomine* in any case whilst their duty to protect the vessel continues.(l) But by *saving* a part of the ship he will thereby be entitled to a *proportion of his wages* although the voyage and freight be wholly lost ; so that in effect he obtains remuneration for his exertion in saving the property.(m) So under ordinary circumstances a *passenger* cannot be entitled to salvage ; but if he preserve the ship after the master and part of the crew have deserted, it might be otherwise.(n)

To assist the right of the salvor he has a *lien* on the property saved at sea,(o) though it would be otherwise in a river,(p) and may retain the same until an adequate *tender* has been made ; but if he should reject a proper tender he might then, at his peril of paying damages as well as costs for the wrongful detention, have to defend an action of trover or

(f) *The Waterloo*, 2 Dodson, Ad. R. 442.

(g) *Id.* 443.

(h) *Mary Ann*, 1 Hagg. Ad. R. 158.

(i) *Belle*, 1 Edwards, Ad. R. 66 ; and *Francis and Eliza*, 2 Dods. Ad. R. 115.

(k) *Prins Frederick*, 2 Dods. Ad. R. 451.

(l) *Governor Raffles*, 2 Dods. Ad. R. 14.

(m) *Neptune*, 1 Hagg. Ad. R. 227 ;

and per Lord Stowell. It is a maxim that “a seaman has a right to cling to the last plank of his ship in satisfaction of his wages, or part of them.”

(n) *Newman v. Walters*, 3 Bos. & Pal. 612 ; *Abbott*, 401, 402 ; when no claim, *The Blendenhall*, 1 Dods. Ad. R. 420.

(o) *Abbott*, 398.

(p) 2 Hen. Bla. 294 ; 1 Ld. Raym. 393 ; 8 East, 57 ; 1 Saund. Rep. 265.

detinue. (q) But it is not by any means necessary to assert the right of lien, and it is an ill-founded and absurd notion that unless salvors stick by the ship they forfeit or in the least impair their title to remuneration, for it is quite unnecessary for the salvor to remain on board or otherwise assume any control over the ship; (r) and where the ship is British and the owners known to be responsible, especially if the claim for salvage is small, it is advisable to remove from all control over the vessel, and prosecute the claim for salvage in due course in the Admiralty or otherwise; and they may not only institute a suit *in rem* against the ship, but also against the owners, so as to affect them personally. (s)

Supposing that the parties cannot agree upon the amount of salvage, then the salvor should *enter his claim* in the Court of Admiralty, and then the owner of the property saved should, in order to avoid the expense of further proceedings, make an adequate *tender* by *acts of Court*, and not merely personally and verbally to the claimants, and also by such act offer to pay the costs already incurred. After such precautionary measures of the owner the salvor would proceed at his peril as respects the costs; for then, if the Court should finally determine that the sum tendered was sufficient, the salvor would not only have to bear his own costs but also pay costs to the owner, if it should appear that the proceedings have been vexatiously pursued. (t) In case of a claim for salvage the owners of the saved ship may take the same on bail at an appraised value, after which the Court, on motion, will not reduce the rate of salvage on the ground that it exceeded the net proceeds, owing to the expenses attending the sale, for the owner and not the salvor incurs the risk of such expenses. (u)

Although strictly speaking the Court of Admiralty has no jurisdiction over questions of *wreck*, (x) yet incidentally in suits for salvage the Court has jurisdiction. In the case of the *Augusta*, Lord Stowell observed that property of the description of *wreck* may by the general law be acquired beneficially

(q) Abbott, 398; and see statute 1 & 2 G. 4, c. 75, s. 37, *id.* c. 76, s. 19, as to tender, &c.

(r) Per Ld. Stowell, 1 Hagg. Ad. R. 156; and see *Trelawney* and *The Hope*, 3 Rob. 215, 216.

(s) *The Hope*, 3 Rob. 215, and case in notes.

(t) *The Vrouw Margeretta*, 4 Rob. 103; *Eleanora Charlotta*, 1 Hagg. Ad. R. 156.

(u) *The Betsy*, 5 Rob. R. 295, and cases there cited.

(x) 3 Bla. C. 106; and see observations of Sir W. Scott in *The Two Friends*, 1 Rob. 283.

CHAP. V.
SECT. XI.

for the crown ; it is therefore very properly in the first instance placed in the custody of the Admiralty. The proctor of the Admiralty interposes for its protection until a claim is given, but as soon as a lawful owner appears, he (the proctor) withdraws his claim, and the right of the crown to the property is then gone, the ship and goods are restored, *but the charges of the Admiralty are still to be paid.* The disbursement of the officers of the crown are made for the preservation of the property, when that is claimed they are entitled to be indemnified ; and therefore in that case Lord Stowell decreed 100% as a remuneration, somewhat in the nature though not strictly as salvage, with costs, and decreed a sale of a sufficient part of the property to pay the amount. (y)

When the
Court of Admi-
ralty has not
jurisdiction.

The Court of Admiralty has no jurisdiction to enforce a claim of *lien* on a ship or her stores, for repairs or stores found in this country, or for any claim of the master ; and if such a proceeding should be instituted, a prohibition may be issued from the Court of King's Bench ; (z) and indeed, as regards necessities provided *abroad* for a ship, unless she was *expressly* hypothecated, there will be no direct lien or claim upon the ship, excepting that it may be seized and sold upon a *fiери facias* in satisfaction of a judgment at law. (a) It seems however that there is a decision tending to create an exception to this rule in the case of a *foreign* ship, which had been provided with stores in England, and in which the creditors here were allowed by this Court to receive their claims out of the balance of the proceeds of such foreign ship then being in the Court. (b) We have seen that in general this Court has no jurisdiction over *ordinary contracts*, as in case of a *bond* executed on ship board to pay money in London ; nor in general in any case of a *sealed* instrument. (c) Bottomry bonds and other instruments of hypothecation constitute exceptions.

Nor for Mort-
gages of a ship ;
or a person
claiming title.

It seems that the Court of Admiralty will not interfere in favour of a mortgagee of a ship who had not taken possession, and, therefore, where a vessel had been sold under a decree of

(y) *Augusta*, 1 Hagg. Ad. R. 20, 21.

(z) Abbott, 110.

(a) *Id.* ; see the second reason in *Justin v. Ballain*, Salk. 34 ; 2 Raym. 805 ; *Watkinson v. Bernardiston*, 2 P. Wms. 367 ; *Hussey v. Christie*, 13 Ves. 594 ; 9

East, 426 ; Abbott, 115 ; and as to the necessity for *express* hypothecation, Abbott, 117, 126, and *ante*, 527.

(b) *The John*, 3 Rob. 288.

(c) 3 Bla. C. 107.

the Court in a suit for subtraction of wages, the Court could not order the surplus of the proceeds to be paid to a mortgagee, to whom possession had never been given; but the Court directed such surplus to remain in the registry, subject to such order as might come to the Court; (d) or the surplus may be invested in Exchequer bills to abide any such order. (e) So the Court of Admiralty does not interfere in cases of *adverse title*; nor does 6 G. 4, c. 110, extend its jurisdiction, or make ships more absolutely transferable under a conditional bill of sale for the purpose of security than before; and, therefore, a warrant of arrest for the purpose of transferring the possession to the holders of such a bill of sale was refused. (f)

It has been said by high authority, that the proceedings of the Admiralty Court are according to the method of the *civil*

Course of proceedings in the Admiralty Court. (g)

(d) *Portsea*, 2 Hagg. Ad. R. 84.

(f) *Fruit Preserver*, 2 Hagg. Ad. R. 181.

(e) *Owen*, 2 Hagg. Ad. R. 88, in notes.

(g) The following forms of proceedings in the *Admiralty Instance Court*, principally in a mariner's suit for wages, &c. in order to arrest the ship as a security, *will assist* in shewing the forms and course of proceedings in that Court.

Admiralty Instance Court.

Susanna—A. B. Master.

Appeared personally C. D. now of Plymouth, in the county of Devon, mariner, and made oath that he served as seaman on board the merchant ship *Susanna*, of the port of Plymouth, whereof A. B. then was and still is acting master, [or "whereof E. F. was sailing or acting master,"] from the — day of — A.D. 1833, to the — day of August, A.D. 1834, at the rate or wages of £4 per month, and that there is now justly due and owing to him, this deponent, the sum of £60, being the balance of wages due to this deponent for his services on board the said ship; and that he hath not been able to obtain the same, notwithstanding repeated applications have been made by him, this deponent, for the payment and satisfaction thereof.

On the — day of — 1834, the said
C. D. was duly sworn to the truth hereof before } C. D.
me,

G. H. Surrogate.

1. Form of affidavit to lead a warrant of arrest.

William the Fourth, by the grace of God, of the United Kingdom of Great Britain and Ireland King, Defender of the Faith. To A. B. Marshal of the High Court of our Admiralty of England, and to his deputy whomsoever, greeting: We do hereby empower and strictly charge and command you jointly and severally that you omit not by reason of any liberty or franchise, but that you arrest or cause to be arrested the ship or vessel called the *Susanna*, whereof A. B. now is or lately was master, her tackle, apparel and furniture, wherever you shall find the same; and the same so arrested you keep under safe and secure arrest until you shall receive further orders from us, and that you cite at the premises all persons in general who have or pretend to have any right, title or interest therein, to appear before us or the judge of our High Court of Admiralty of England or his surrogate, in the Common Hall of Doctors' Commons, situate in the parish of St. Benedict, near Paul's Wharf, London, on the default day after [Trinity] term, to wit, the — day of — next ensuing, between the usual hours for hearing causes, there to answer unto C. D. late a mariner on board the said ship or vessel, in a cause of subtraction of wages, civil and maritime: and further to do and receive in this behalf as unto justice shall appertain, and that you duly certify us or our said judge or his surrogate what you shall do in the premises together with these presents. Given at London in our aforesaid Court under the seal of the same for causes, the — day of — A.D. 1834, and of our reign the fifth.

2. Warrant thereupon to arrest the ship for the arrears of wages.

Action £

L. S.

A. B.

Registrar.

CHAP. V.
SECT. XI.

law, like those of the Ecclesiastical Courts, and that upon that account it is usually held at the same place with the superior

3. Summary petition or libel for wages. Admiralty Instance Court.

On the — session of — term, to wit, the — day of — A.D. 1834, before the Right Honourable the Judge.

The *Susanna*. A. B. Master.

C. D. late mariner of the above-named ship } On which day E. F. in the name
Susanna, whereof A. B. now is or lately was the } and as the lawful proctor for the
owner of the said ship, in a cause of subtraction } said C. D., and under that deno-
of wages, civil and maritime, against E. F. of — } mination and by all better and
more effectual ways, means and methods, and to all intents and purposes as the law
that might be most beneficial to his said party doth say and allege, and in law articu-
lately propound as follows, to wit:—

First, That sometime in or about the 1st day of January, A.D. 1833, the said ship or vessel *Susanna*, whereof the said A. B. was lately master, being then in the port of London, and designed on a voyage to — and elsewhere, the said E. F. the owner, did by himself or agent, on the high and open seas, and within the flux and reflux thereof, and within the jurisdiction of the High Court of Admiralty, ship and hire the said C. D. to serve as (mariner) on board the said ship on her then intended voyage, &c. &c. [N.B.—Here follows the rate of wages, shewing the contract of the hiring, &c. That on the said 1st of January, 1833, he entered on board the said ship and into the service thereof, and on the — day of the said month of January signed the usual ship's articles or mariner's contract. [Then follows the statement of the ship's departure, and where she went, and shortly all she did to the time of the discharge of the party engaged. Then stating that he did his duty during such time, &c. That he hath made application to the owner for payment and without success, and then adds, "and so much the said E. F. the owner doth know, and in his conscience believes to be true, and the party proponent doth allege and propound of any other time or times, place or places, hour or hours of the person or thing as shall appear from proofs to be made in the cause, and every thing this article contained jointly and severally.

Second, If there were any specific agreement between the parties as to any particular mode of payment, as for instance, the person engaged leaving an order for his wife in England to receive so much monthly from the owner, or as the case may be, here state the result of such agreement, and what she actually received, and then shewing the balance due, &c.

Third, That in supply of proof of the premises in the next preceding articles mentioned, and to all intents and purposes in the law whatsoever, the party proponent doth exhibit and hereto annex and prays to be here read and inserted and taken as parts thereof a certain paper writing marked No. 1, which he doth allege and propound to be the original certificate of service of the said C. D. given him by the said A. B. master; [and also another paper writing marked No. 2, which he doth allege and propound to be the original certificate as to the retention of the sum of £ — out of the wages of the said C. D. to answer for the payments in the said monthly note or order left by C. D. to his wife, &c.] And that the whole body, lines and contents of the said certificate, and the respective subscriptions thereto were and are of the proper handwriting of the said A. B. the master, and are so well known and held to be by divers persons of good credit and repute who have frequently seen him write, and write and subscribe his name, and are thereby become well acquainted with his handwriting and subscription.

Fourth, That all and singular the premises were and are true.

Malta, July, A.D. 1834.

No. 1. Certificate of due service of the mariner referred to in libel, and to be annexed.

This is to certify that C. D. served as a mariner on board the ship *Susanna* from the date of — day of January, 1833, [the day of signing the articles] until [day of discharge], during which time he behaved himself properly, and was always obedient to command.

A. B.
Master.

Malta (same date.)

No. 2. Another like certificate.

This is to certify that I have stopped £ — from C. D. for monthly money presumed to have been paid in London, and that the said C. D. is entitled to that sum or any part thereof which may not have been paid by E. F. the owner.

A. B.
Master.

Ecclesiastical Courts at Doctors' Commons in London.(g) But although *some parts* of the practice of the civil law may have been adopted, yet there is *much more* wholly independent of the civil law course of proceeding; and in particular the judge of the Admiralty Court may, as well in civil as in criminal cases, have the assistance of a jury;(h) although, at least in suits for collision, he usually decides upon his own view of the facts and law, after having been assisted by and hearing the opinion of two or more Trinity Masters which vessel was to blame.(i)

In some cases, as in the instance of collision of ships, whether British or foreign, the 1 & 2 G. 4, c. 75, s. 22, allows a *summary application* to any judge of either of the Courts of Record at Westminster, or to the judge of the Court of Admiralty, and upon either being satisfied that damage has arisen by the misconduct or negligence of the master or mariners of a *foreign* ship, such judge may cause the *foreign* ship to be arrested and detained until the master or owner or consignee of such vessel shall undertake to appear to the suit for the collision, and find sufficient bail for all costs and damages; and

Admiralty Instance Court.

On the — day of — term, to wit, on the — day of November, A.D. 1834.

The Emily. A. B. Master.

C. D. formerly a mariner belonging to the said ship Emily, against the same, in a cause of subtraction of wages, civil and maritime. } On which day, in the name and as the lawful proctor of E. F. of — the present owner of the said ship or vessel, and under that denomination and by all better and more, &c. &c. follows, to wit:—

First, That the said ship Emily, during the time the said C. D. belonged thereto, was the property of the said E. F.

Second, That whilst the said ship Emily was at — the said C. D. &c. [shewing here the bad conduct of the said C. D. amounting to mutiny or desertion, or other ground of forfeiture of wages, and such other matter shewing that the articles of agreement were substantially broken, and all other matters calculated to support and insure the defence.]

Third, That all and singular the premises were and are true, and so forth.

[Head or title as before.]

First, Whereas in the first article of the summary petition given in and admitted in this suit on the part and behalf of the said C. D. it is among other things alleged and pleaded, to wit, [here follows the statement, then the answer thereto, shewing same to be false, &c. &c. stating the owner's case at length, and pledging proof.]

Second, Here state the ownership of the ship, and any other matter, as the case for the owner.

Third, That all and singular the premises were and are true, and so forth.

The warrant in this case is the same in every respect as the preceding warrant to arrest a ship for wages, save in the following words:—"to answer unto A. B. the owner of, &c. [naming the salvor's ship] in a cause of salvage, &c.

This warrant is in substance the same as a warrant for wages or salvage, excepting that the proceeding is against the person of the master to arrest him.

(g) 3 Bla. Com. 68, 69, 108.

(h) See a valuable note, *The Ruckers*, 4 Rob. 74, n. (s). (i) *Ante*, 514, 515.

4. Allegation on behalf of an owner in a cause of subtraction of wages, shewing mutinous or bad behaviour of complainant amounting to desertion.

5. Allegation on behalf of an owner in a cause of subtraction of wages.

6. Warrant to arrest ship for salvage.

7. Warrant to arrest master of a ship for a sea battery.

CHAP. V.
SECT. XI.

the suit may be either at law or in the Admiralty Court. (*k*) It is supposed to have been observed in the same case, that the most summary proceeding, called an "*act on petition*," is a convenient form of proceeding in matters of *slight* interest, but not adapted to *important* cases; (*l*) and not unfrequently the Court of Admiralty allows a summary form of proceeding, as by such an *act on petition*, and in which the parties state their respective cases briefly, and support their statements by affidavit: (*m*) thus this form is adopted in a proceeding to enforce payment of a bottomry bond.

In a suit for salvage or wages, it is advisable to make an *adequate tender* in the first stage of proceeding in a regular form, viz. by *act in court*, offering not only the due remuneration, but also expenses up to the time; in which case, but not otherwise, if the tender turn out to have been sufficient, the defendant may be relieved from the subsequent costs. (*n*)

The Admiralty or Instance Court is so distinct in jurisdiction from the Prize Court, that if an affidavit in a *civil* suit be sworn before a prize commissioner it is irregular. (*o*) In cases of collision as well as others, the Court will, preparatory to a final decree of sale, sign a "*primum decretum*," on an affidavit that the ship is in a perishable condition. (*o*)

The *first process* in this Court is frequently by *arrest* of the defendant's *person*, as in the instance of a sea battery we have just noticed, (and this although at law and under the statute 12 G. 1, c. 29, a person cannot be arrested without an affidavit of the cause of action,) (*p*) and upon which the defendant must find bail, (*q*) or fidejussors in the nature of bail; (*r*) and in case of default, the bail and principal may be imprisoned. (*s*) The Court may also fine and imprison for a contempt in the face of the Court, (*t*) and yet this is not a Court of Record. (*u*)

In the Admiralty it is an ancient established formula to initiate or commence a suit there by *arrest of ship*, tackle, apparel, and furniture, and leading to a full remedy, affecting all the property of every kind belonging to the owner. (*x*)

(*k*) *Christiana*, 2 Dod. Ad. R. 183.
(*l*) *Ville de Varsoire*, 2 Dod. Ad. R. 184.

(*m*) Per Lord Stowell in the *Ville de Varsoire*, 2 Dod. Ad. R. 184; 1 Hagg. Ad. R. 1. n.; *The Vrouw Margaretta*, 4 Rob. 106.

(*n*) *The Vrouw Margaretta*, 4 Rob. R. 106, 107.

(*o*) *Sylvan*, 2 Hagg. Ad. R. 155.
(*p*) Clerk's Prac. Cur. Ad. p. 13; 3 Bla. Com. 108; *The Ruckers*, 4 Rob.

73.

(*q*) *The Ruckers*, 4 Rob. 73.

(*r*) Clerk's Prac. Cur. Ad. 11; 1 Rol. Ab. 531; Raym. 78; 2 Ld. Raym. 1216; 3 Bla. Com. 108, 109.

(*s*) 1 Rol. Ab. 531; Godb. 193, 260; 3 Bla. Com. 109.

(*t*) 1 Vent. 1; 1 Keb. 552; 3 Bla. Com. 109.

(*u*) Bro. Ab. Error, 177; 3 Bla. Com. 69, 109.

(*x*) *Dundee*, 1 Hagg. Ad. R. 124.

In order to obtain *restitution*, there must be *bail* for the value of the ship and intermediate earnings, and to return the vessel into the hands of the owners, if the Court should ultimately adjudge the possession to them. (y) Bail, at least those given in case of capture, remain liable, notwithstanding laches, and even after nine years' delay. (z)

In a case of alleged damage, committed by one ship to another, an action is *entered* and *warrant issued to arrest the ship*, and the proceeding is against the ship, her tackle, apparel and furniture; and the ship is released upon adequate bail to answer for the liability of the stores as well as the ship. (a) We have seen the effect of the bond executed by one part-owner to another conditioned for the safe return of the vessel. (b)

Sometimes a *monition* is the first proceeding, as a monition requiring an agent to bring in his account of the sale of a ship and cargo, and the balance of the proceeds undistributed, as in case of prize. (c) If a satisfactory return be not made to the monition, then the judge may *decree* him to be *attached*, but may afford time for submission, and order that the attachment be not enforced until a named time has elapsed; (c) after which, if the agent still remain in contempt, he may then be imprisoned. (c) But the Court refused (on the merits) an attachment against a part-owner, on the ground that he had not, as it was insisted, *substantially* complied with a decree of possession, and left the complaining part-owner to seek his further remedy elsewhere. (d)

With respect to *contempts*, the registrar of the Court reported, that the usual practice was *not* to arrest the guilty party in the *first instance*, although there was no doubt of the power; as in cases of wearing illegal colours, the first step was usually to grant a warrant to attach the person, founded on an affidavit of the fact. In a case where a ship had been taken possession of under the warrant of the Admiralty as derelict, and the cargo had been put into a warehouse by the agent of the Admiralty, and the warehouse had been broken open and the cargo taken out and sold, the Court, after precedents had been consulted, decreed a monition to *shew cause* why an attachment should not issue for contempt, and refused

(y) *Partridge*, 1 Hagg. Ad. R. 82.

(z) *The Vreede*, 1 Dod. Ad. R. 1.

(a) *Dundee*, 1 Hagg. Ad. R. 110, 125.

(b) *Ante*, 517 to 519; and 1 Hagg.

Ad. R. 312, 313; 2 *id.* 275, 280.

(c) *Harreguard*, 1 Hagg. Ad. R. 23, and notes.

(d) *John of London*, 1 Hagg. Ad. R. 342.

CHAP. V.
SECT. XI.

the application for an *immediate* attachment and production of account of sale. (e)

There is an *express rule* of the Court of Admiralty of 5th August, 1806, that in every case where *bail* is required to be given in any cause depending in this Court, a *notice in writing* of the persons proposed to become bound shall be delivered at the office of the adverse proctor, and that no *bail-bond* or recognizance shall be taken, unless the adverse proctor, or some other proctor for him, be there present, or an affidavit be exhibited to prove that he has had such notice for the space of twenty-four hours, and been required to attend at the time of giving such bail, for the purpose of objecting or consenting thereto. (f) It should seem that the Court of Admiralty as well as the Prize Court, has jurisdiction *to rehear and revise its own decrees*, but will very reluctantly permit such a proceeding. (g)

SECT. XII.—Of the Prize Court.

SECT. XII.
Of the PRIZE
COURT.

Sometimes the *Prize Court* has been described as if it were merely a branch of the Court of Admiralty; (h) but although the same judge usually presides in each, yet his authority to hear and decide *prize* causes entirely depends upon a *special and separate commission* under the great seal, issued at the commencement of each war, and the whole system of litigation and jurisprudence in the Prize Court, though exceedingly important, is peculiar to itself and is governed by rules not applying to the Instance Court of the Admiralty, which is a mere *civil* tribunal. (i) We have seen that in general injuries against the rights and *law of nations*, or committed under pretence of *capture* or *prize*, are never cognizable in a *municipal* Court, but only by the King, or some Court or persons *particularly* commissioned by him to take cognizance of such injuries, as in this instance of our Prize Court holden under a particular commission, and with which the temporal Courts cannot interfere by *prohibition*; (k) and there is no proper *international* Court; and no *action* can in general be sustained in a municipal Court

(e) 1 Rob. 331.

(f) 5 Rob. R. 406.

(g) *The Vrouw Hermina*, 1 Rob. 163.

(h) 3 Bla. C. 70.

(i) *Le Caux v. Eden*, Dougl. 594, 614;*ante*, vol. i. 2, note (b), 16 and 818; and see Palmer's Prac. House of Lords, 370, n.(k) 1 Madd. Ch. Pr. 15; *The Harmony*, 2 Dods. Ad. R. 78, 377.

for a *hostile capture or seizure* under colour of *prize* at sea or in foreign parts, (*l*) though a *mere piratical* or illegal seizure under pretence of *war* is, we have seen, remediable in the ordinary Court of Admiralty; (*m*) when the taking was *as prize* the proceeding for redress must be in the *Prize Court* under the existing special commission; (*n*) nor can any action for false imprisonment or detention of goods or ship be sustained. (*o*) This jurisdiction however does not take away that of the Court of Chancery, where a person, in whose favour an adjudication has been made, is a *trustee* for other parties, in which case he may be compelled in a Court of Equity to perform such *trust*. (*p*)

We have seen that where the property is in value under 100%. the Prize Court will determine upon the right on a summary proceeding. (*q*) No prohibition to the Prize Court of Admiralty will be granted for proceeding to adjudication on a ship taken as a prize, either during war, or even after the cessation of hostilities, for the Court has jurisdiction to complete what has been regularly commenced. (*r*)

In this Court of Prize are directly decided not only all questions relative to captures, but prize and sometimes *booty* (*s*) (or prize on shore), but also most other questions upon the law of nations, though sometimes the latter, and even the construction of *treaties*, are collaterally argued and determined in other Courts. The jurisdiction of the Prize Court is not like that of the Instance Court confined to transactions on the sea, but extends as well to hostile seizures on shore. (*t*) It has been justly observed that the powerful judgments to be found in Sir Christopher Robinson's Reports, commencing A. D. 1798, and the other subsequent reports, are models of judicial intelligence, impartiality, and eloquence, inducing all foreigners to admit that the English modes of administering of justice in the Court of Admiralty and of Prize are beyond comparison superior to those of any other foreign tribunal. (*u*) But as we are now in a state of *peace* it would be of little utility to add further observations on the jurisdiction and practice of the Court of *Prize*, however important its jurisdiction in time of war.

(*l*) *Elphinstone v. Bedreechemed*, Knapp, Rep. 516 to 361; *Hill v. Reardon*, 2 Sim. & Stu. 431; 2 Russ. R. 606.

(*m*) *Ante*, 538, n. (*i*).

(*n*) *Id.*

(*o*) *Id. ibid.*; *Faith v. Pearson*, Holt's Chan. Pr. 69, 70, note 14; *Duckworth v. Tucker*, 2 Taunt. 7; *Bolton v. Gladstone*, 2 Taunt. 85.

(*p*) *Hill v. Reardon*, 2 Russ. R. 608.

(*q*) *The Mercurius*, 5 Rob. 127; *ante*, vol. i. 818.

(*r*) 1 Madd. 15; *The Harmony*, 2 Dods. Ad. R. 78, 577.

(*s*) 1 Hagg. 40.

(*t*) Sir W. Scott in *The Two Friends*, 1 Rob. Ad. R. 283.

(*u*) See Lord Grenville's Speech on the Russian Convention of 1801, p. 28 a. and 1 Hagg. Ad. R. 235, note.

CHAP. V.
SECT. XIII.

SECT. XIII.—*Of the Court of Bankruptcy and its Subdivisions, as each Commissioner's Court, and the two Subdivision Courts; Court of Review; and Appeals to the Lord Chancellor or to House of Lords.*

1. The existing Law and what alteration introduced by 1 & 2 W. 4, c. 56.
2. Abstract of Stat. 1 & 2 W. 4, c. 56, with Notes.
3. Abstract of Stat. 2 & 3 W. 4, c. 114.
4. Abstract of the General Rules and Orders of the Court of Review.

1. Those of 12th January, 1832.
2. Of 2d & 3d February.
3. Of 15th February.
4. Of 19th March, &c. &c.
5. General Observations and Present Course of Proceeding.

General observations.

The last of the Courts, having as well *original* as appellate jurisdiction, to be here noticed, is "*The Court of Bankruptcy*," and in which, especially under the recent act for the *administration* of the bankrupt law, viz. 1 & 2 W. 4, c. 56, the existence of *debts* and *claims* upon a bankrupt and rights to his property may be investigated and decided, and when *facts* are disputed may be tried by a *jury*, and there are a succession of *appeals* or *re-investigations of facts* as well as of *matters of law*; as from a single commissioner to one of the two Subdivision Courts, and from thence to the Court of Review, and from thence to the Lord Chancellor, and from his decision even to the highest tribunal—the House of Lords. The jurisdiction of the Courts we have previously considered are principally confined to litigation between two or more *solvent* individuals; but the Courts of Bankruptcy have jurisdiction only in cases where a trader or person subject to the bankrupt laws is not only supposed to be in a state of *general insolvency*, but has also *committed an act of bankruptcy*, and who is therefore considered to be no longer capable of performing his pecuniary engagements, and that therefore it is fit that, as far as practicable, an equal distribution of his effects amongst all his creditors should be secured by vesting the property in some third person or persons, to be administered under some public and uniform authority.

The substance of the former Bankrupt law continues, and only the practice has been materially altered, and that only as regards the Court and officers,

A system of bankrupt law administered under a *commission of bankruptcy* had long been established, and was consolidated by 6 G. 4, c. 16, and upon *that statute* still stands the *substance* of the law of bankruptcy as it relates to the *person* who may become a bankrupt, the *act of bankruptcy*, the *debt* of the *petitioning creditor*, who may cause a commission, now termed a *fiat*, to be issued, the *debts* that may be proved so as to receive dividends, the doctrine of *relation* to the act of bankruptcy, the law of *reputed ownership*, and respecting actions by and against assignees, and the *dividend* and the *certificate*. The laws respecting

those subjects *have not been materially altered*, so that the treatises of the Honourable Mr. Eden (now Lord Henley (*x*)), of Montague and Gregg, (*y*) and of Mr. Deacon, (*z*) and some minor works, and the author's summary, (*a*) respecting *those* subjects are *still in a great degree applicable*. But as regards the *Courts* and the official *persons* by whom the bankrupt law is to be *administered*, as well as the *practice*, the recent acts, 1 & 2 W. 4, c. 56, and 2 & 3 W. 4, c. 114, coupled with the rules and orders founded thereon, (*b*) have almost entirely *changed* the *jurisdiction* as well as the *practice* upon this important subject. (*c*)

Formal commission annulled.

Before the 1 & 2 W. 4, c. 56, it was necessary to issue a *verbose commission* addressed to several *commissioners* by names, and of whom as respected the metropolis there were *seventy*, and three of whom presided on *every occasion*, and received *fees* for each meeting however short or trifling the occasion. (*d*) *Assignees* also, not practically acquainted with the duties of their office, were chosen by the creditors, and had the entire possession of and control over the estate, and being generally in trade themselves very often failed with large sums belonging to the estate in hand, which were entirely lost to the creditors.

Outline of former jurisdiction and practice, and of the present ameliorated jurisdiction.

But *now*, in lieu of *such commission*, the Chancellor, Master of the Rolls, or Vice-Chancellor, or the Masters of the Court of Chancery, acting under an appointment by the Chancellor, on an *affidavit* and *bond* and petition, similar in substance to those previously required, may, in case the bankrupt resides in or within forty miles of London, issue his concise *fiat* under his hand in lieu of such commission, and thereby authorize such creditor to prosecute his complaint *in the Court of Bankruptcy*, (*i. e.* before one of the six appointed commissioners, and with

The issuing of a London fiat.

(*x*) Eden's Digest Bankrupt Law, 3 ed. A.D. 1832, per tot.

(*y*) Montague & Gregg's Bkpt. Law.

(*z*) Deacon's Bankrupt Law.

(*a*) See a compact Summary, Chitt. on Bills, 8th ed. 628 to 673, which was framed purposely to give a concise practical view of the Bankrupt Law for the use of students.

(*b*) Rules and Orders, 12 Jan. 1832; additional Rules of same date, and Rules 2 Feb., 15 Feb., 19 March, 27 March, and 28 March, 1831, stated in 1 Deacon & Chitty's Rep. XXIII. to XXXII; and see post, 551 to 555.

(*c*) The student will find a clear exposition of the stat. 1 & 2 W. 4, c. 56, and the first Rules and Orders, in Mr. Stewart's Practice in Bankruptcy. The

subsequent Rules and Orders, with the decisions thereon, will be found in Chitty & Deacon's Rep.; and see Montague & Bligh's Rep.

(*d*) It frequently occurred that merely for the purpose of examining a bankrupt or a third person respecting some matter of fact of but small importance, a private meeting of three commissioners was convened, and fees paid to each commissioner, and if the time of attendance exceeded two hours it was considered unreasonable, and the meeting was adjourned, although the commissioners were perhaps merely reading a newspaper all the time, excepting at the moment of signing their names; and thus this useless tribunal was as expensive as it was vicious. See also Eden's Bkpt. L. 79.

CHAP. V.
SECT. XIII.The issuing of
a country fiat.

the power of appeal, &c.) (*e*) and which *fiat* is directed to be *filed* in that Court, and thereupon any one or more of the six commissioners is authorized to act in execution of the act, (*f*) and he is selected by ballot under the 11th and 12th Rules or Orders of 12th January, 1832, made in virtue of that act. (*g*)

To provide for a *country* bankruptcy, (that is, where the bankrupt resides out of London, or more than forty miles therefrom,) the judges on their circuits are to return to the Chancellor the names of barristers, solicitors, and attornies resident in country districts, and if he approve, they are placed on a list of country commissioners, and then *fiats* for *country* proceedings in bankruptcy are not to be directed to the *Court of Bankruptcy*, or prosecuted before one of the six commissioners, but are directed to some *one or more* of *such* persons in *rotation*, who are to be particularly named in the fiat, and are thereupon to act as such commissioners within their districts.

The Lord Chancellor *alone* has jurisdiction under the 19th section by his order to *annul* a *fiat*, and such order is to have the effect of the former proceeding by writ of supersedeas.

An analysis of
1 & 2 W. 4, c.
56, altering the
jurisdiction and
powers of the
Court of Bank-
ruptcy and its
subdivisions.

The four judges
of the Court of
Review.

The six com-
missioners.

An outline of the statute 1 & 2 W. 4, c. 56, (which commenced in operation from and after the 11th January, 1832,) may here be useful. The 1st section constitutes by name the *entire* Court or jurisdiction, "the Court of Bankruptcy," and enacts that *four* persons of prescribed standing at the bar shall be the *judges* of such Court; and *six* persons, being barristers of not less than seven years' standing, or of four years' standing at the bar, who have practised as a special pleader for three years below the bar, *commissioners* of such Court; (*h*) and then

(*e*) 1 & 2 W. 4, c. 56, sect. 12.

(*f*) *Ibid.* sect. 13.

(*g*) Upon the granting every fiat, whether in a town or country bankruptcy, 10*l.* is to be paid to the Chancellor's Secretary of Bankrupts, and all which sums are once a week to be paid into the Bank of England, see 1 & 2 W. 4, c. 56, sect. 45; and every official assignee is out of the first monies that come to his hands, and immediately after the choice of assignees by the commissioners, to pay 20*l.* to the accountant-general; see sect. 40.

It will be observed, that the *London* commissioners and other officers are remunerated by a fixed salary; *country* commissioners are entitled to 20*s.* for every meeting, with a like fee for the execution of every deed, (of which however there are but few since 1 & 2 W. 4, c. 56, sects. 25, 26 and 27,) and for every certificate, 6 G. 4, c. 16, sect. 22; and a further

allowance of 20*s.* to commissioners being barristers, and for travelling seven miles or upwards to the place of meeting, an additional fee of 20*s.* But no charges for eating or drinking can be legally made, *Ex parte Halliday*, 7 Vin. Abr. 77; *Ex parte Harbin*, 1 Rose, 59; *Ex parte Griffiths*, 2 Rose, 342; 1 Madd. R. 56; *Ex parte Buller*, 1 Mont. Dig. 638; Eden's (Ld. Henley's) Bkpt. L. 3d. edit. 81.

(*h*) Under this act the Hon. Thomas Erskine, K. C. was appointed the Chief Justice, and Sir A. Pell, Sir J. Cross, and Sir G. Rose were appointed the puisne judges.

The vacancy occasioned by the death of Sir A. Pell has not been filled up, so that now there are only *three* judges of the Court of Review. And the Privy Council Act, 3 & 4 W. 4, c. 41, sect. 26, enables *two* of the judges of the Court of Review to form the Court when the Chief

declares that the same Court shall be and constitute a *Court of Law* as well as *Equity*, (*h*) and shall, together with every judge and commissioner thereof, have, use, and exercise all the rights, incidents, and privileges of a *Court of Record* or *judge* of a Court of Record the same as the judges of the Courts at Westminster. (*i*)

CHAP. V.
SECT. XIII.

Constituted a Court of Law and Equity and of Record.

The *second* section enacts that such four judges, or any *three* of them, shall form a *Court of Review*, which shall always sit in public, (excepting when otherwise directed by *that act*, or by the rules to be made in pursuance thereof,) and shall have *superintendence* and *control* in all matters of bankruptcy as theretofore exercised upon petition to the Chancellor. And the 3 & 4 W. 4, c. 41, sect. 1 and 26, constituting the Chief Justice of the Court of Review one of the judges of the Judicial Committee of the Privy Council, enables any *two* of the judges of the Court of Review to hold and constitute the Court during the absence of the Chief Justice when attending such Judicial Committee.

Sect. 2. The Court of Review to have the same jurisdiction as the Chancellor previously had on petition.

The *third* section enacts that the matters to be heard and determined in such Court of Review shall be brought on by way of *petition*, *motion*, or *special case*, according to the *rules and regulations to be established* as thereafter provided; and the decision of such Court of Review is to be *final* and subject only to an *appeal* to the Lord Chancellor on *matters of law and equity*, or on the *refusal or admission of evidence only*. And such limited matters of appeal to the Chancellor are to be only on a *special case*, and such case shall be approved and *certified* by one of the judges of the Court of Review, in matters arising in that Court, and by the judge trying the issue, in matters arising out of the trial of issues; and the determination of such judge, on the settlement of such case, shall be final and conclusive. The appeal to the Chancellor under this act is to be heard *only* by the Chancellor, and *not* by any other judge of the High Court of Chancery; which enactment, it has been observed, impliedly abrogates the jurisdiction of the Vice-Chancellor to interfere, excepting only in issuing his *fiat*, (under sect. 12,) so as merely to *initiate* proceedings against a bankrupt. (*k*)

Sect. 3. Course of proceeding in Court of Review to be on petition, motion, or special case.

Decision of Court of Review to be final, except on appeal by special case to be heard and determined by Chancellor only.

Justice is absent therefrom by reason of his attendance at the Judicial Committee of the Privy Council.

(*h*) Even before this act commissioners of bankrupt were considered as having equitable as well as legal jurisdiction, *Bromley v. Goodere*, 1 Atk. 77; and as to

discretionary power, &c. *Ex parte King*, 11 East, 92; 11 Ves. 417; 13 *ibid.* 181; 15 *ibid.* 126; Stewart's Prac. Bankruptcy, 11, note (*a*).

(*i*) 1 & 2 W. 4, c. 56, sect. 1.

(*k*) Eden's Bkpt. L. 3 edit. 457, and *ante*, 449.

CHAP. V.
SECT. XIII.

Sect. 4. Court of Review may direct an *issue* in fact to be tried before one of its own judges or by a judge on circuit.

Sect. 5. Costs in discretion of Court.

Sect. 6. The six commissioners to form two Subdivision Courts of three commissioners each.

Sect. 7. Any one commissioner may execute powers of act, except that one can only *commit* for safe custody.

Sects. 8, 9. Official oaths of judges, &c.; appointment of two registrars.

Sect. 10. Attornies and solicitors may be admitted, and how far practise. (m)

The *fourth* section authorizes the Court of Review to direct any *issue of fact* arising therein to be tried by a jury before one of the judges thereof, or before a judge of assize, and gives necessary powers to compel the attendance of jurors and witnesses, and to enforce the orders and decrees of the Court of Review.

The *fifth* section declares that all *costs* of suit between party and party in the said Court of Review shall be in the discretion of the Court, and shall be taxed by one of the masters of the Court of Chancery.

The *sixth* section enacts that the six commissioners may be formed into two *Subdivision Courts*, consisting of three commissioners for each Court, for hearing and determining the matters and things, and making the examination referred to each Subdivision Court by sect. 30; and that all references or adjournments by a single commissioner to a Subdivision Court shall be to the Subdivision Court in which such single commissioner belongs, unless in case of sickness. The 36th rule or order of 12th January, A. D. 1832, directed that the *first* Subdivision Court should consist of C. F. Williams, J. Evans, and R. G. C. Fane, esquires; and the *second* Subdivision Court should consist of J. H. Merivale, S. M. Fonblanque, and E. Holroyd, esquires.

The *seventh* section enacts that *any one* of the six commissioners may execute all the powers, duties, and authorities given by any bankrupt act the same as if he had been specially named in a commission, with the exception that *one* commissioner can *only* commit for *safe custody*; and the party must within three days following be brought up before the Subdivision Court or the Court of Review.

The eighth section prescribes the *oath* to be taken by each judge and commissioner; the ninth section authorizes the appointment of two *registrars* and eight deputy registrars. (l)

The tenth section entitles all attornies and solicitors of either of the superior Courts at Westminster to be admitted and have their names enrolled in the Court of Bankruptcy without any fee, other than allowed by that act, viz. 5s., (m) and they may

(l) The chief judge has a salary of 3000*l.* per annum, the puisne 2000*l.* each. Each commissioner 1500*l.*; each chief registrar 800*l.* per annum; and each deputy registrar 600*l.* The whole expense of the establishment is now 36,400*l.*, though formerly it was about 70,000*l.*

(m) Deacon and Chitty's Reports, 5.

It is not necessary that a person suing out a *fiat* should be a solicitor in chancery; an attorney of a common law court may obtain and prosecute a *fiat*, *Wilkinson v. Diggles*, 1 B. & Cres. 158; *Ford v. Webb*, 3 Br. & B. 241. If guilty of fraud, collusion or misconduct, or gross ignorance or negligence, the Lord Chancellor for-

afterwards appear and plead in any proceedings in that Court without being required to employ counsel (*except in proceedings before the Court of Review, and upon the trial of issues by jury*). But any other person not admitted, who shall practise, incurs a contempt and penalties; and attornies admitted are liable to the like consequence as attornies and solicitors practising in the superior Courts.

The 11th section enacts, "that the judges of the Court of Review, with the consent of the Chancellor, may make *general rules and orders* for regulating the *practice* of the said Court of Bankruptcy, the sitting of the judges and commissioners thereof, and the conduct of the other officers and of the practitioners therein." Accordingly, on the 12th January, 1832, *thirty-six* such rules and orders were made and promulgated, and intended to regulate all *subsequent* proceedings; and some rules were at the same time made relating to preceding commissions, and a form of petition to the Court of Review was prescribed; (n) and subsequently other general rules and orders have been also made under this power.

S. 11. Power of Court of Review to make general rules and orders.

The *Court of Bankruptcy* having been thus constituted of each Commissioner's Court, the two Subdivision Courts, and the Court of Review, (with an appeal to the Lord Chancellor and an appeal also from him in certain cases to the House of Lords), (o) the statute then proceeds to enact, (in sect. 12,) "that in lieu of the former commission, the Lord Chancellor, the Master of the Rolls, the Vice-Chancellor, and each of the Masters in Chancery, acting under any appointment by the

S. 12. The Chancellor, Master of the Rolls, and Vice-Chancellor, &c. when and how to issue his fiat in bankruptcy.

merly might on petition order him to pay costs occasioned, 14 Ves. 209; 13 Ves. 62—67; Buck, 24, 27; and for gross misconduct he might have been removed, 1 Gl. & J. 78. The Court will only exercise a *summary jurisdiction* over an attorney when he acted in the character of an officer of the Court and not in an ordinary case between attorney and client; *Ex parte Bull*, 3 Dea. & Chit. 116; and see *Ex parte Hicks*, 2 *ibid.* 573; where the Court will interfere summarily, *Ex parte Williams*, 3 Dea. & Chit. 103.

Tuesday, June 24, 1834, *In re Robert Marks, alias Marsh*.—Mr. Montagu applied at the instance of the Incorporated Law Society, that Robert Marks, *alias Marsh*, should be struck off the roll of practitioners belonging to this Court, a similar application having been already complied with in the Court of Exchequer.

The Court said, that as the party in question had not been served with a notice of the application, it would not pro-

ceed at once to this extremity.

Rule *nisi* granted.

Afterwards, on 4th July, 1834, in the Court of Review, in the same matter of Marks, Mr. Montagu presented a petition praying the Court to admit substituted service of an order upon the defendant, it being sworn that he was not to be found at home, and it was thought that he had left the country. The order had reference to proceedings instituted against the defendant, an attorney, for striking him off the roll, as he had been already from some other Courts.

The Court granted the prayer of the petition.

(n) The following is the prescribed form of petition:

In the matter of C. D. a Bankrupt.
To the Right Honourable the Chief Judge and the other Judges of the Court of Review. The humble petition of, &c.
Sheweth that, &c.

(o) Sect. 37.

CHAP. V.
SECT. XIII.

Chancellor to be given for that purpose, on *petition* made to the Chancellor against any *trader* having committed any *act of bankruptcy* by any creditor of such trader, and upon his *filing* such *affidavit* and giving *such bond as is by law required*, (p) to issue his *fiat* under *his* hand, thereby authorizing such creditor to prosecute his said complaint in the said Court of Bankruptcy, (q) or to prosecute the same *elsewhere* (r) before such discreet and proper persons as the Chancellor, &c. by such fiat, may think fit to nominate and appoint, and which persons so appointed are to have the same powers as if they had been specially assigned by a commission.

S. 13. One commissioner to act thereon when appointed by ballot on a town fiat, and how to be balloted for.

The 13th section enacts, "that every such fiat prosecuted in the said Court of Bankruptcy (meaning a London bankruptcy) shall be filed and entered of record in the said Court, and thereupon any one or more of the six commissioners may proceed thereon." But the fiat as well as the act are silent as to the *particular* London commissioners; and therefore the 11th of the General Rules and Orders of the 12th January, 1832, directs that upon every application for an appointment *for opening a fiat*, the registrar shall, in the presence of the solicitor applying for the same, *allot such fiat by ballot to one of the commissioners of the Court*, according to the regulation to be from time to time prescribed by the Court of Review, except in cases of second or renewed fiats, which shall go to the *same commissioners* before whom the former commission or fiat was prosecuted; and the 12th order directs, that the registrar shall, in the presence of such attorney or solicitor, *write upon the face of the fiat the name of the commissioner* before whom the same is to be opened; and thus *by ballot* all partiality or preference in the choice of the London commissioner is imperatively avoided.

S. 15 and 16. Commissioners' oath and proceedings to adjudge the party a bankrupt.

The 15th section prescribes the oath of the commissioners; and the 16th section enacts, that the provisions of the former acts relating to bankrupts and to commissioners of bankruptcy, &c. shall be applicable except as particularly varied. The *single* commissioner on a town fiat, therefore, instead of the *several* commissioners named in the commission as theretofore, is to proceed precisely according to the former practice, viz. *ex parte*, and when the petitioning creditor's debt, trading, and act of bankruptcy have been proved before him to his satisfac-

(p) Obviously referring to the previously existing law then in force under 6 G. 4, c. 16.

(q) i. e. meaning in the Court in *Lon-*
don.

(r) Meaning in the country.

tion, he is to proceed to *adjudge the party bankrupt.* (s) On a country fiat the commissioners (who have not, like the London fixed commissioners, taken a general oath of office,) must first qualify themselves by taking the oath directed by the 15th section; (t) after which they are to receive the evidence of the petitioning creditor's debt, and of the trading and act of bankruptcy, and proceed to adjudge the party a bankrupt as heretofore.

The 17th section prescribes the *time* and *manner* of proceeding in case the *bankrupt disputes the adjudication*, and enacts, that in that case he shall present a *petition*, praying the reversal of such adjudication, to the Court of Review within two calendar months from the date of the adjudication, if such trader (u) shall be then residing within the United Kingdom; or within three calendar months, if residing elsewhere in Europe; or within a year, if residing elsewhere; or within such other time as the Court shall allow, not exceeding one year; and such Court of Review shall proceed to hear and decide upon such petition; or there may be an issue and trial by a jury, and an appeal to the Chancellor upon matter of law or equity, or admissibility of evidence. (x) Under sect. 18 the Chancellor may issue another fiat at the instance of another creditor.

S. 17 and 18.
Proceedings when bankrupt disputes his bankruptcy or adjudication.

The 22d section relates to *official assignees*, and in great amelioration of the former practice in bankruptcy (which vested the estate of the bankrupt wholly in persons chosen by the creditors, and who perhaps had never before acted in such a character, and not unfrequently misapplied the bankrupt's estate, (y)) now enacts, that a number of persons, not exceeding *thirty*, being merchants, brokers, or accountants, who were or had been engaged in trade in London or Westminster, should be chosen by the Chancellor to *act as official assignees* in all bankruptcies prosecuted in the said Court of bankruptcy, (that is, under a London fiat,) and *one* of whom should in all cases be an assignee of each bankrupt's estate, *together with the assignee or assignees chosen by the creditors*; such *official assignee* to give such security, to be subject to such rules, to be selected for such estate, and to act in such manner, as the judges of the Court of Review, with the consent of the Lord Chancellor, should direct; and such *official assignee alone* is to possess and receive rents, and all estates real and personal of

S. 22. Appointment of an *official assignee*, in whom property vested.

(s) Eden's Bankrupt Law, 3d ed. 72, 73.

(t) *Ibid.* p. 72.

(u) *Sic* in statute, *sed quære* if it should not have been party, as one ground

of disputing in adjudication may be that there was *no trading*.

(x) Eden's Bankrupt Law, 3d ed. 73; 74.

(y) *Ibid.* 207, a.

CHAP. V.
SECT. XIII.

the bankrupt, (save only when others were directed by the said Court of Bankruptcy, or a judge or a commissioner thereof,) and all stock in the public funds, and monies and negotiable securities, are to be forthwith transferred, delivered, and paid by such official assignee into the *Bank of England*, to the credit of the accountant-general of the Court of Chancery, or he incurs a penalty.

The 23d section, however, provides that the official assignee shall not interfere with the creditors' assignee in the appointment or removal of a solicitor or attorney, or in the sale of the bankrupt's estate.

Official assignee, how balloted for by rotation on a town fiat.

The 17th and 18th Rules of 12th January, 1832, direct that the official assignees shall be divided equally among the six commissioners, and that each commissioner shall appoint his appropriated assignees *to act in rotation* under the several bankruptcies prosecuted before him, such rotation to be settled by ballot, except in special cases to be referred by the commissioners adjudicating them to the other commissioners of his Subdivision Court, or the Court of Review.

S. 25, 26, 27. Necessity for instruments of assignment or conveyance to assignees abrogated. (s)

The 25th, 26th, and 27th sections vest the property in the assignee or assignees for the time being, without the useless necessity for any deed or conveyance, as theretofore required.

S. 34. Proof of debts by affidavit and proceedings thereon if disputed and trial by jury.

The 34th section relates to the *proof of debts*, and introduces a convenient alteration in the proceeding, which formerly required each creditor to attend *in person* before the commissioners and sign in their presence a written deposition upon oath of his debt. (a) This section authorizes any creditor to make *proof* of his debt *by affidavit*, sworn before one of the judges of the Court of Review, or a commissioner, or a master in chancery, ordinary or extraordinary; or if such creditor reside out of England, by affidavit sworn before a magistrate where such creditor shall be residing, and attested by a notary public, British minister or consul; subject, nevertheless, to such rules and orders touching the *personal attendance* of any creditor to make such proof according to the then existing laws and practice in bankruptcy, as the Court of Review, with the consent of the Chancellor, shall make and direct. (b) Section 30 authorizes

(s) See Eden's Bankrupt Law, 223 to 258.

(a) 6 G. 4, c. 16, s. 46; *Ex parte Woolley*, 1 Gl. & J. 395; *Ex parte Symes*, 11 Ves. 521, and see now Eden's Bkpt. L. 3d edit. 100.

(b) This was to continue the power of examining the creditor proving as to the

consideration of the debt, it not being compulsory to receive the proof, 1 Atk. 71, 222; especially when the merits of the debt may be questionable, see *Ex parte Butterfill*, 1 Rose, 192; 1 Ves. & B. 214; *Ex parte Kemshed*, 1 Rose, 149; *Ex parte Symes*, 11 Ves. 521; Eden's Bkpt. L. 3d edit. 101.

the commissioners to adjourn the examination of a proof of a debt to be heard before a Subdivision Court, so as to have the assistance of two other commissioners, and which latter Court is to proceed with such last mentioned examination, and finally, without any appeal (except upon matter of law or equity or the refusal or admission of evidence,) shall determine upon such proof of debts; but it is provided, that in case, before the single commissioner or the Subdivision Court, *both parties*, the assignees or the major part of them and the creditor, *consent* to have the validity of any debt in dispute tried by a *jury*, an *issue* shall be prepared under the direction of the commissioners or Subdivision Court, and sent for trial before the chief judge or one or more of the other judges; and *if one party only* applies for such issue the said commissioners or Subdivision Court shall decide whether or not such trial shall be had, subject to an appeal as to such decision to the Court of Review. (c) The 33d section enables the Court of Review to grant a *new trial*.

Trial by a jury of existence of a debt.

With respect to *appeals*, the 31st section enacts, that if a commissioner or one of the Subdivision Courts shall determine any point of law or matter of equity, or decide on the refusal or admission of evidence in *case of any disputed debt*, such matter may be brought under the review of the Court of Review by the party who thinks himself aggrieved, and the proof of the debt shall be suspended until such appeal shall be disposed of, and a sum not exceeding any expected dividend on the *debt in dispute* may be set apart in the hands of the accountant general until such decision be made, and in the like manner there may be an appeal on the like matter of law or equity from the Court of Review to the Lord Chancellor. The 32d section enacts, that if the Court of Review shall determine on any appeal touching any decision in matter of law upon the whole merits of any *proof of debt*, then the order of the said Court shall finally determine the question as to the said proof, unless an appeal to the Chancellor be lodged within one month from such determination; and in case of such an appeal, the determination of the Chancellor shall be final touching such proof; but if the appeal, either to the Court of Review or to the Chancellor, shall be allowed in relation to the admission or refusal of *evidence*, then the proof of the debt shall be again heard by the commissioner or Subdivision Court and the said evidence shall then be admitted or rejected accordingly. We have seen that the 3rd

S. 31 & 32. In what cases the decision of commissioners or Subdivision Court may be appealed from to the Court of Review and from thence to the Chancellor.

(c) The introduction by this act of the power of trying the existence of a disputed debt by a *jury* is *entirely new*.

CHAP. V.
SECT. XIII.

S. 37. Appeal
to the House of
Lords, when and
how it may be
prosecuted.

Summary of
other enact-
ments in 1 & 2
W. 4, c. 56.

section prescribes the *manner* in which appeals from the Court of Review, viz. by *special case*, shall be brought before the Chancellor, and that the same must be determined by himself and not delegated to the Master of the Rolls or Vice-Chancellor. (d)

The 37th section relates to *appeals to the House of Lords* and enacts, that in case the Chancellor shall deem any matter of *law or equity*, brought before him by way of appeal from the Court of Review, to be of *sufficient difficulty* or importance to require the decision of the House of Lords, or in case *both parties* in any proceeding before the Court of Review shall desire that any such matter may be determined in the first instance by the House of Lords and not by the Chancellor, then the Chancellor or Court of Review may direct the whole facts whereupon such question shall arise to be stated in the form of a *petition of appeal* to the House of Lords, and the party appealing may carry such appeal to the House of Lords *in like manner* as other appeals are preferred to that House; and the section then contains directions respecting the *mode* of stating the facts in such petition.

This act contains several minor regulations, as that a commissioner may appoint two or more instead of the three public meetings under the former act for the bankrupt to surrender and conform, and the last of which meetings is to be on the forty-second day after the publication of the bankruptcy in the Gazette, and that the choice of assignees shall take place at the first of such two meetings. (e) The judges and commissioners are also authorized to take the whole or any part of the evidence given before them either viva voce on oath or upon affidavit. (f) Section 42 enacts, that no commission or fiat shall be superseded or annulled, nor any adjudication reversed, by reason only that the same has been *concerted* by and between the petitioning creditor, his solicitor or agent, or any of them; and the bankrupt, his solicitor or agent, or any of them, except in cases then pending. (g) Section 38 authorizes the assignees, with the approbation of the proper Subdivision Court, to appoint the bankrupt himself to superintend the management of the estate, or carry on the trade for the creditors, and otherwise to act, and on such terms as they may think fit, which enactment is entirely new.

The 43d section enacts, that if the assignees *agree to refer* any matter in such manner as by law they were then already empowered to do, such agreement of reference may be made a

(d) Sect. 3, *ante*, 543.

(e) Sect. 20.

(f) Sect. 38.

(g) It was formerly otherwise, 1 Rose, 37; 1 Buck, 77. 257; 1 Gl. & Jam. 17; Bul. N. P. 99.

rule of the Court of Bankruptcy. The 57th section authorizes each commissioner to order and allow such sum as he thinks reasonable to be paid to the official assignee as a remuneration for his services.

CHAP. V.
SECT. XIII.

On the 15th August, 1832, another act relating to bankruptcy was passed to amend the laws, viz. 2 & 3 W. 4, c. 114., providing for the custody of records under former commissions of bankrupt and to their enrolment. Section 5 enacts, that fiats shall be entered of record on application of any interested party, and without any written petition for the purpose; and section 6 prescribes the fees for entry of commissions and fiats; section 8 enacts, that no fiat shall be received in evidence unless first entered of record; and section 9 provides, that upon the *production* of any commission, fiat, adjudication, assignment, appointment of assignees, certificate, deposition, or other proceeding in bankruptcy, purporting to be sealed with the seal of the said Court of Bankruptcy, or of any writing purporting to be a copy of any such document, and purporting to be sealed as aforesaid, the same shall be received as evidence of such documents respectively and of the same having been so entered of record, without any further proof thereof. But perhaps *the most important* enactment is contained in the 7th section, viz., that the *deposition of a deceased witness* relative to a petitioning creditor's debt, trading, or act of bankruptcy, duly entered of record, shall be *admissible in evidence* and have the same effect as if the matters alleged therein had been deposed to by the same witness in such Court according to the ordinary course and practice thereof, subject, however, to the qualifications therein prescribed.

Substance of the
statute 2 & 3
W. 4, c. 114,
relating to
bankrupts.

We have already adverted occasionally to the General Rules and Orders of the Judges of the Court of Review, made and promulgated on the 12th of January, A. D. 1832, under the 11th section of 1 & 2 Wm. 4, c. 56, and several other subsequent Rules, which may be thus abstracted:—

The Rules and
Orders founded
on 1 & 2 W. 4,
c. 56, s. 11,
ante, 545.

Rule 1st. Prescribes that all affidavits shall be filed with the registrar.

The General
Rules and
Orders, 12 Jan.
A. D. 1832.

2d. That the registrar's office shall be at the Court of Commissioners of Bankrupts in Basinghall Street, London, and shall be kept open daily, except Sundays, from ten in the morning until four in the afternoon, and in the evening from seven to nine:

CHAP. V.
SECT. XIII.

3d. That attornies shall be admitted and enrolled in the Court of Bankruptcy by order of Court of Review.

4th. That such admission and enrolment shall be upon production of a certificate from the proper officer, and upon filing his own affidavit of his being such attorney or solicitor and of the date of his former admission, such affidavit to be sworn by him, if residing in London or within ten miles, before the Court of Review, and if residing elsewhere, before a Master in Ordinary or Extraordinary in Chancery. (*h*)

By Order 5 only the sum of 5*s.* and not 25*s.* are demandable. (*i*)

The 6th Rule requires every attorney and solicitor admitted in the Court of Bankruptcy to enter in the registrar's book, at his office, his name and place of abode, or some other proper place in London, Middlesex or Southwark, within one mile of that office, where he may be served with notices, summonses, orders and rules in matters depending in the said Court, and in case of neglect, then the fixing up of any notice or the copy of a summons, order or rule for such attorney or solicitor in the office of the chief registrar shall suffice.

Rule 9th. That all proceedings before the Commissioners in the Court of Bankruptcy shall be written on parchment or paper of *one uniform size*, and shall remain of record in the said Court.

Rules 10, 11 and 12, relate to the filing of fiats and allotting Commissioners by ballot as already shewn, and the registrar's writing the name of the elected commissioner on the fiat. (*k*)

Rule 13 requires the fiat to be prosecuted before the elected commissioner, unless otherwise specially ordered by the Court of Review or one of its judges.

Rule 14 requires the commissioners to sit daily (Sundays and holidays thereafter to be named only excepted) at ten o'clock, at the Court of Commissioners of Bankrupts in Basinghall Street, and shall hold their *Subdivision Courts* at the same place as occasion may require. (*l*)

Rule 15. That a deputy registrar shall attend upon each commissioner to take minutes, to draw up and have the charge

(*h*) As to who may be admitted, see *ante*, 544. If an attorney be unable from bodily infirmity to attend to be sworn in, he may be allowed to be admitted on an affidavit sworn before such master, *Ex parte Swain*, 1 Dea. & Chit. 15. And under special circumstances a person may be admitted as an attorney of this Court

nunc pro tunc, *Ex parte Tanner*, 3 Dea. & Chit. 10.

(*i*) 1 Dea. & Chit. Rep. 5.

(*k*) *Ante*, 546.

(*l*) It will be observed that the duration of the commissioners' stay at the office is not fixed. The registrars are, by rule 2, to continue at their office till four o'clock.

of all proceedings before him under the superintendence of the chief registrar.

Rule 16. In lieu of attaching a copy of the Gazette as theretofore, the deputy registrars are to make a memorandum of the appearance of the advertisement in the Gazette, and of the date thereof, with proper reference to the file to facilitate search.

The 17th and 18th Rules, we have seen, direct that the official assignees shall be divided equally amongst the six commissioners, and be chosen by ballot.

The 20th Rule directs that the appointment of any assignee to any bankrupt's estate shall be under the hand of the commissioner, and shall remain of record in the said Court of Bankruptcy; and certificates of such appointment, under the seal of the Court, shall be delivered to such assignee by the registrar on application for the same.

The 21st Rule prescribes that no official assignee shall, either directly or indirectly, carry on any trade or business, or hold or be engaged in any office or employment other than his said office and employment.

The 22d, 23d and 24th Rules require each official assignee to find sureties to the extent of 6000*l.* and execute to the two registrars a joint and several bond in the penal sum of 6000*l.* and enjoin certain notices and proceedings respecting the same.

The 25th Rule enjoins each official assignee to obey the instruction of his commissioner or of the Court of Review.

The 26th Rule orders each official assignee to pay into the Bank of England all monies as soon as they amount to 100*l.*, and to deliver an account therewith.

The 27th Rule *recommends* each commissioner to allow to the official assignees *one per cent.* on the monies they receive, and one and a half per cent. more on the monies actually divided, but subject to reduction by the Court of Review.

The 28th and 29th Rules direct that a messenger shall, upon taking possession, forthwith take an inventory of the bankrupt's effects, but that no appraisement shall be made or other expenses incurred without the special direction of the commissioner, until after the appointment of the creditors' assignees, and a table of reduced messenger's fees is then *recommended*.

Rule 30 directs that all petitions presented to the Court of Review shall be entered in the registrar's office, and that the fiat directing the attendance thereon shall be under the seal of the Court of Bankruptcy, and that the original petition shall, when served, be returned to the registrar on or before the

CHAP. V.
SECT. XIII.

hearing and be filed of record, and that it shall not be necessary to recite such petition at length in any order pronounced by the Court thereon.

Rule 31. All the process of the Court of Review shall be under the seal of the Court of Bankruptcy.

Rule 32. That all agreements of reference to be made rules of the Court of Bankruptcy shall be so made by order of the Court of Review, and all matters arising thereon shall be heard and determined by the Court of Review.

Rule 33. That all recognizances to be taken and acknowledged in the Court of Bankruptcy shall be taken and acknowledged before the Court of Review.

Rule 35. That the practice in the Court of Review shall, until otherwise ordered, be conformed as nearly as may be to the present practice in matters before the Chancellor.

Rule 36. That the *first Subdivision Court* shall consist of C. F. Williams, Joshua Evans and R. G. C. Fane, Esquires; and the *second Subdivision Court* shall consist of J. H. Merivale, S. M. Fonblanque and E. Holroyd, Esquires.

T. ERSKINE, C. J.

ALBERT PELL, J.

J. CROSS, J.

G. ROSE, J.

12 January, 1832, approved BROUGHAM, C.

General Order,
2 & 3 February,
1832.

It is ordered that each official assignee shall present *for acceptance* all unaccepted bills of exchange as soon as he shall receive the same and before he deposits them in the Bank of England as thereafter directed.

That each official assignee shall deposit in the Bank of England, to the credit of the accountant-general of the Court of Chancery, all bills, notes and other negotiable instruments, (except unaccepted bills), as soon as he shall receive the same, with a statement in writing, with the cashier of the bank, stating the date, contents, &c. and take a receipt for the same, to be produced, when required, to the commissioners, and the cashier is to duly present such securities for payment, and if paid pay the proceeds into the bank to the credit of such accountant-general. And in case such security be dishonoured, the cashier is to deliver the same to a notary to be duly noted and protested, and who is to return the same to the cashier to be again deposited in the bank.

Signed by the same Judges.

Court of Review, 15 February, 1832.

It is further ordered that official assignees shall give due notice of dishonoured bills, notes and other negociable securities.

CHAP V.
SECT. XIII.

General Order,
15 February,
1832.

Court of Review, 19 March, 1832.

It is ordered, that in all matters referred by this Court to any judge or commissioner of the Court of Bankruptcy, he may in his report state such special circumstances as he shall think fit without being specially directed so to do.

General Order,
19 March, 1832.

When bankrupts holding short bills, the property of a customer, become a bankrupt, the customer may on petition to the Court of Review obtain an order for the accountant-general to deliver such bill to enable him to proceed thereon. His Honour the Chief Judge said that there ought to have been no difficulty in such a case, for there was a general order that upon the dishonour of any bill it should be restored to the official assignee. The prayer of the petition was granted.(m)

The Bankrupt Law at present stands thus. The 6 G. 4, c. 16, s. 1, describes the *persons* who may be made bankrupts. Sections 2 to 8 define the *acts of bankruptcy*. Section 13, the affidavit and bond to found a commission, which were precisely as now required. The rest of that act prescribed the *other* parts of the law of bankruptcy, most of which, as already observed, is still in force. The new act 1 & 2 W. 4, c. 56, s. 12, in addition to the Lord Chancellor, also authorizes the Master of the Rolls, the Vice-Chancellor, or a Master of the Court of Chancery (when so especially authorized by the Chancellor) to issue his *fiat* in lieu of the commission theretofore issued under 6 Geo. 4, c. 16, s. 12. But the most important alterations are in 1st, constituting each of the six appointed commissioners a separate and subordinate Court; and then, as a Court of Appeal, or to assist each commissioner, are, 2dly, two Subdivision Courts of three commissioners: 3dly, is the Court of Review, holden before a chief justice, (who is also one of the judges of the judicial committee of the privy council, under 3 & 4 W. 4, c. 41, s. 1,) and at present two other judges, to whom are delegated all the powers that, under the former system, were vested in the Lord Chancellor on a petition in bankruptcy from the decision of any of the former *seventy* commissioners or country commissioners, now abolished. This Court of Review is a Court of Appeal as well from the decision of each commissioner, as also from both the Subdivision Courts, and in case the proof

5. General observations on the effect of the recent acts and rules, and the present course of proceeding in obtaining a *fiat*, proving a debt, and the other proceedings thereupon.

(m) *Ex parte Ellis and others. In re Sir George Duckett and Co., Court of Review,* 16 April, 1831. Chitty on Bills, 8 edit. 805.

CHAP. V.
SECT. XIII.

of a debt is disputed, has power to summon a jury and try the existence of the debt, before one of the judges of the Court of Review or a judge on the circuit. It is also a Court of Law and Equity and of Appeal from the decision of such commissioner and Subdivision Courts, and upon the improper admission or rejection of evidence. And upon a special case, there is an appeal from the Court of Review to the Chancellor, and from his decision to the House of Lords.

The practical course of proceeding to obtain and prosecute a fiat.

The *course of proceeding*, when one creditor or several creditors in partnership can swear to the existence of a single debt of 100*l.*, or two separate creditors to debts of 150*l.*, or three or more creditors to debts in the aggregate of 200*l.* is,

First, To search the docket book at the Bankrupts' Office, situate in Basinghall Street, London, in order to ascertain whether a docket has been already struck, and if not, then,

Secondly, To prepare an *affidavit* of such debt or debts, and of the creditor's belief that his debtor is *become* bankrupt, which allegation imports two facts, viz., a trading, or that he is otherwise subject to the bankrupt laws, and that he has committed an act of bankruptcy. (*n*)

Thirdly, When the bankrupt resides in London, or within forty miles thereof, (*o*) this affidavit is to be *sworn* before a Master in Chancery; but if the creditor reside in the country, and beyond that distance, then before a Master Extraordinary in Chancery. (*p*)

Fourthly, The creditor is then, in pursuance of 6 G. 4, c. 16, s. 13, to execute the usual *bond*, in the penalty of 200*l.*, conditioned to prove his debt and that an act of bankruptcy is committed by the debtor before the fiat was issued. (*q*) Such

Form of petitioning creditor's affidavit on which to petition for a fiat.

(*n*) A. B., of Oxford Street, in the county of Middlesex, linen draper, maketh oath that C. D., of Leicester Square, in the said county, draper, dealer and chapman, is justly and truly indebted unto him, this deponent, in the sum of £—— and upwards, for (*or upon*) (here state the subject matter of the debt.) And the deponent further saith that the said C. D. *hath* become and is bankrupt, within the true intent and meaning of the statutes made and now in force concerning bankrupts, as this deponent hath been informed and believes.

Sworn at the Public Office this —— day of } A. B.
——, A. D. ——, before me, }

Master in Chancery.

(*o*) When the bankrupt resides above forty miles from London, a country commission (now fiat) is necessary. 2 Cooke, B. L. 2.

Form of affidavit to obtain a country fiat.

(*p*) [Same as the affidavit to the end, *supra*, and then add.] And that the fiat of bankruptcy sought to be issued against him the said ——, when obtained, is intended to be executed at Bury St. Edmunds, in the county of Suffolk, or within ten miles of the same, and not within forty miles of London.

Sworn at Bury St. Edmunds, in the county of }
Suffolk, this —— day of ——, A. D. }
1834, before me, L. M., a Master Extraor- }
dinary in Chancery.

Form of petitioning creditor's bond.

(*q*) Know all men by these presents, that I, A. B., of Oxford Street, in the county of Middlesex, linen draper, am held and firmly bound to the Right Honourable Henry Lord Brougham and Vaux, Lord High Chancellor of Great Britain, in £200, of good

bond need not be stamped, but must be sealed and delivered in the presence of two witnesses. This is usually executed at the Bankrupt Office, when a town fiat is to be issued. But if the creditor reside in the country, the bond is then usually there executed, and transmitted with the affidavit to a solicitor in town. (r)

Fifthly, In both cases the affidavit and bond are taken to and deposited at the Bankrupt Office and *the fiat bespoke*, and an *entry* is made in the *docket book*, and which proceedings are termed "*striking the docket*." At the time of leaving the affidavit and bond at the Bankrupt Office the fiat is bespoke, and £1 : 12s. 6d. deposited with the deputy secretary, and on calling for the fiat at the appointed time, or obtaining it immediately, the further sum of £8 : 7s. 6d. is paid, so as to make up the £10, as required by the statute 1 & 2 W. 4, c. 56, s. 45.

Sixthly, After the affidavit and bond have been left at the Bankrupt Office and the fiat bespoke, the *petition* for the fiat, addressed, as we have seen, *in all* cases to the Lord Chancellor,

and lawful money of Great Britain, to be paid to the said Lord Chancellor, or his certain attorney, executors, administrators or assigns, to which payment well and truly to be made, I bind myself, my heirs, executors and administrators, firmly by these presents, sealed with my seal, dated this — day of —, A. D. —. The condition of this obligation is such that if the above bounden A. B. shall prove as well before his majesty's Court of Bankruptcy, [or in a country bankruptcy, "before the commissioners to be appointed in a fiat against C. D. of, &c., draper, dealer and chapman,"] under a fiat in bankruptcy against C. D., of Bond Street, in the county of Middlesex, draper, as upon a trial at law, in case the due issuing forth of the prosecution of bankruptcy against the said C. D. shall be contested and tried, that the said C. D. was and now is justly and truly indebted to the said A. B. in the sum of £100 or upwards, and hath become and is bankrupt within the true intent and meaning of the statutes made and now in force concerning bankrupts;* and if the said A. B. shall cause the said fiat and prosecution of bankruptcy to be proceeded in according to the directions of an act of parliament made in the sixth year of the reign of his late majesty, intituled an act to amend the laws relating to bankrupts, then this obligation to be void, otherwise in full force.

A. B. (L. S.)

Sealed and delivered in the presence of

E. F. }
G. H.† }

(r) The penal part is the same as that of a bond to obtain a London fiat, but the condition thus varies.

The condition of this obligation is such that if the above bounden A. B. shall prove as well before the major part of the persons appointed to act as commissioners of bankrupt, under a fiat in bankruptcy against C. D., as upon a trial at law, in case the due issuing of the said fiat be tried, that the said C. D. was justly and truly indebted to the said A. B. in the sum of £100 or upwards, and hath become bankrupt; and if the said A. B. shall cause the said fiat to be executed according to law, then this obligation to be void, or else to be in full force.

Sealed, &c.

A. B. (L. S.)

* The 6 G. 4, c. 16, s. 13, requires a bond, conditioned for proving an act of bankruptcy at the time of taking out the commission. It will be observed that neither the affidavit nor bond nor petition expressly states that there had been any

adequate trading, but merely that the party had *become bankrupt*.

† The bond is to be in a penalty of 200l.; it need not be stamped, but must be attested by two witnesses.

CHAP. V.
SECT. XIII.

is prepared by the clerks in the Bankrupt Office; (s) but to prevent the possibility of mistake in the description of the bankrupt or otherwise, it may be advisable for the petitioning creditor's solicitor very carefully to prepare the full form, and request the clerk in the office to observe it, for certainly it is the particular duty of the solicitor to see that the fiat be in all respects correct.

Seventhly, The instrument or fiat having been engrossed on parchment, thereupon either the Chancellor or the Master of the Rolls or Vice-Chancellor, (or one of the Masters in Chancery acting under the appointment of the Chancellor for that purpose,) personally *signs* such fiat, and in terms thereby authorizes the petitioning creditor to prosecute his complaint *in the Court of Bankruptcy* (if it be a town bankruptcy; (t) or if *elsewhere*, then before certain *therein named Commissioners*, (u)

Form of petition
for a fiat.

(s) To the Right Honorable Henry Lord Brougham and Vaux, and Lord High Chancellor of Great Britain.

The humble petition of A. B. of Oxford Street, in the county of Middlesex, linen-draper, on behalf of himself and all other creditors of C. D. of Bond Street, in the said county, draper, dealer and chapman :—

Complaining, sheweth unto your Lordship, that the said C. D. being a trader, and using and exercising the trade of a merchant, dealer and chapman, seeking his trade or living by buying and selling, upon just and good causes, being indebted unto your petitioner in the sum of £100 and upwards, did lately commit an act of bankruptcy [or, “about the month of — last past did become bankrupt,] within the true intent and meaning of the laws concerning bankrupts, and that your petitioner hath filed such affidavit and given such bond as is by law required.

Your petitioner therefore most humbly prays that your Lordship will be pleased to issue your fiat, authorizing your petitioner, as such creditor as aforesaid, to prosecute his complaint in his Majesty's Court of Bankruptcy.

And your petitioner shall ever pray, &c.

Dated 1st October, A.D. 1834.

Form of petition
for a country fiat and
proceedings.

The same as a petition for a London fiat, excepting the last paragraph, in lieu of which conclude as follows :

Your petitioner therefore most humbly prays, that your Lordship will be pleased to issue your fiat, authorizing your petitioner, as such creditor as aforesaid, to present his complaint before such discreet and proper persons as your Lordship by such fiat may think fit to nominate and appoint to act as commissioners of bankrupt in that behalf.

A. B.

And your petitioner shall ever pray, &c.

Form of fiat in
a town bank-
ruptcy.

(t) Upon reading the petition made to me by A. B. of Oxford Street, in the county of Middlesex, linen draper, against C. D. now or late of Bond Street, in the county of Middlesex, draper, dealer and chapman and trader, and as trader indebted to the said petitioner in £ — and upwards, and as having committed an act of bankruptcy, and the said petitioner having made such affidavit and given such bond as by law required,* I hereby authorize the said petitioner to prosecute his complaint in his Majesty's Court of Bankruptcy. Dated this — day of — A.D.

Brougham, C.

The like, more
concise.

To his Majesty's Court of Bankruptcy.

I hereby authorize A. B. of, &c. to prosecute his complaint against C. D. in the Court of Bankruptcy.

Brougham, C.

Form of a fiat
for a country
bankruptcy and
proceedings.

(u) The same as the form of a London fiat, *supra*, to the asterisk, and then as follows, in lieu of the conclusion in that form, “I hereby authorize the said petitioner to prosecute his complaint before G. H. and I. K. esquires, and N. O. and P. Q. gentlemen, or before three or more of them, whom I nominate and appoint to act as commissioners of bankrupt in that behalf, of whom you the said G. H. and I. K. to be one.

Brougham, C.

The like in a
more concise
form.

Dated this — day of — 1834.
I hereby authorize A. B. of, &c. to prosecute his complaint against C. D. of, &c. at Liverpool, in the county of Lancaster, before G. H. I. K. and L. M. esquires.

Brougham, C.

being persons previously named by the judges and approved by the Chancellor, and who are taken by rotation from the list in which their names are written.)

CHAP. V.
SECT. XIII.

We have seen that the circumstance of a town or country *fiat* having been *concerted* (as to get rid of a preference under an execution) is now declared not merely of itself to constitute any objection; (*u*) but a *concerted act of bankruptcy*, for the purpose of issuing a fiat, would not sustain it. (*x*) And although the mere circumstance of a fiat having been obtained by *concert* (as in order to get rid of a previous execution) constitutes no objection to the proceeding, yet if a fiat be obtained *fraudulently*, to deter others from striking a docket, and without any *bona fide* intent to proceed thereon, but with the view improperly to protect a private assignment to the petitioning creditor, it would be otherwise, at least against the latter. (*y*)

Enactments
and decisions as
to validity of
fiat, &c.

If the commissioner should find that the petitioning creditor's debt was insufficient to sustain the fiat, then he should also, when another debt is proposed to be substituted under the 18th sect. of 6 G. 4, c. 16, *expressly* find that such debt proposed to be substituted was incurred *not anterior* to such defective petitioning creditor's debt. (*z*) If a fiat be annulled on account of the insufficiency of the petitioning creditor's debt, it is always at *his cost*. (*a*) If a fiat be lost, a new one must be issued. (*b*)

The *residence* and name of the bankrupt must be correctly and *bona fide* described in the fiat, or it may on petition be superseded. (*c*) If there be a material mistake in a fiat, as in the name of the bankrupt, the same petitioning creditor may apply to the Court for leave to obtain a new fiat. (*d*) But the Lord Chancellor has no jurisdiction to order a fiat to be amended, and therefore the Court of Review will not, on motion, order the officer to deliver it out for the proposed purpose of amendment; (*e*) though in one instance, where no proceedings had taken place, an amendment in the name was

(*u*) 1 & 2 W. 4, c. 56, s. 42, but formerly it was otherwise, *ante*, 550, n. (*g*); and *Ex parte Bellwood*, 2 Dea. & Chit. 37; *Ex parte Mills*, 1 Mont. & Ayr. Rep. 311.

(*x*) *Marshall v. Barkworth*, 4 B. & Adol. 508; 1 Nev. & M. 279.

(*y*) *Ex parte Mucklow*, 3 Dea. & Chit. 25.

(*z*) *Ex parte Hunter*, 2 Dea. & Chit. 507; Eden, 3d ed. 49.

(*a*) *Ex parte Fletcher*, 2 Dea. & Chit. 374.

(*b*) *Levet*, 1 Montg. & Ayr. 508.

(*c*) *Tanner*, 2 Dea. & Chit. 563; *Dart*, *id.* 543; see prior law, Eden's Bank. L. 3d edit. 57; see the general rule as to the consequences of misdescription, *Ex parte Mills*, 1 Mont. & A. Rep. 310, 311. As to the *fiat in general*, see several cases, 1 Mont. & Bligh's Rep. 263 to 265.

(*d*) *Edwards*, 1 Dea. & Chit. 531.

(*e*) *Wright*, *id.* 547; *quære* the terms of the report, *Todd*, *id.* 319; *Montague's Bank. Cases*, 455, S.C.; *Walker*, 1 Dea. & C. 531; *Mont. Bank. Cases*, 510, S.C.

CHAP. V.
SECT. XIII.

permitted. (*f*) Where a joint fiat was issued against A. and B., and the debt was separate, it was holden void, and could not be rendered valid as a separate fiat against B. (*g*) And if a second fiat be issued pending negotiations, contrary to good faith, a motion to supersede the first fiat will be dismissed with costs. (*h*) When all the witnesses reside in one neighbourhood very distant from London, the Court, on a very full affidavit, may make an order that the fiat be directed to commissioners there, as in Northumberland, instead of being executed before a London commissioner. (*i*)

PROCEEDINGS
AFTER OBTAIN-
ING A FIAT.

Eighthly, The fiat issued by the Chancellor to be *prosecuted* in the Court of Bankruptcy is to be *filed* of record within *seven days* from its date, and no appointment for the opening of such fiat shall be made until it shall have been so filed. (*k*)

Ninthly, The petitioning creditor *must proceed* upon a *fiat*, on a London bankruptcy, within fourteen days after its date, and upon a fiat for *country proceedings* within twenty-eight days, or the same may be superseded. (*l*) But the time may be enlarged for opening a fiat, on affidavit that the petitioning creditor bona fide intends to prosecute the same, and that there is no composition pending or intended, and no connivance with the bankrupt. (*m*)

Tenthly, For the purpose of proceeding on a town fiat, the 11th of the General Rules of the 12th of January, 1832, we have seen, directs that an application shall be made to the registrar for an appointment for *opening the fiat*; and thereupon he is, in the presence of the solicitor applying for the same, *to allot* such fiat by ballot to *one* of the six commissioners; and after such allotment, the 12th rule directs the registrar to write upon the face of the fiat the name of the allotted commissioner before whom the fiat is to be opened. (*n*)

Eleventhly, To proceed on a fiat for London proceedings, it is said that the *messenger* of the Bankrupt Court must be employed to obtain an appointment by such allotted commissioner to open and proceed and receive the deposition of the petitioning creditor's debt, and of the trading and act of bankruptcy, and to adjudicate and proceed further upon the fiat. (*o*) But it should seem that the *solicitor* of the petitioning creditor

(*f*) *Graham*, 1 Dea. & Chit. 458.

(*g*) *Clark*, 1 Deac. & Chit. R. 544.

(*h*) *Ex parte Baker*, 2 Dea. & Chit. 362.

(*i*) *Bolan*, 2 Dea. & Chit. 331; and see *Eden's Bank. L.* 3d edit. 60.

(*k*) Tenth General Rules and Orders of 12th January, 1832.

(*l*) Lord Rosslyn's order, 26th June

and 5 Nov. 1793; *Eden*, 3d edit. 65, 66, Append. 113; *Ex parte Henderson*, 2 Rose, 190.

(*m*) *Ex parte Smith*, 1 Mont. & A. 473; and see form of affidavit there suggested.

(*n*) *Ante*, 546.

(*o*) *Eden*, 3d edit. App. 113.

might properly obtain from the commissioner his appointment, so as to be certain that all proper parties will be in attendance.

CHAP. V.
SECT. XIII.

OF THE MEETING FOR OPENING THE FIAT AND ADJUDICATION.

Twelfthly, At the appointed time the allotted commissioner will sit at the Bankrupt Office in Basinghall Street, and the petitioning creditor and his solicitor with his witnesses to swear to his debt and to the trading and act of bankruptcy, must, in general, attend in *person*. On a town fiat the commissioner, having already taken a *general* oath of office, need not again take any oath; but on a country fiat the first proceeding at the meeting of the commissioners named in the fiat is for each to take the following oath—"I, A. B. do swear that I will faithfully, impartially and honestly, according to the best of my skill and knowledge, execute the several powers and trusts reposed in me as a commissioner in a prosecution of bankruptcy against C. D., and that without favour or affection, prejudice or malice.—So help me God."

Of the meeting to open fiat and proceed to adjudication, &c.

Thirteenthly, In general the *petitioning creditor* must attend in person when the fiat is *opened* to prove his debt, as well before the London commissioner as before country commissioners, and the circumstance of his residence at eighty-five miles distance from the place of meeting was not admitted as an inadequate ground for dispensing with his personal attendance; (o) but if it be a much greater distance, as 200 miles, it might be otherwise. (p) So the petitioning creditor's presence at the opening of the fiat has been dispensed with on account of *age* and *illness*; and even the signature of the petition has been dispensed with. (q) Perhaps as the 1 & 2 W. 4, c. 56, s. 34, permits the *subsequent proof of debts by affidavit*, instead of requiring *personal* appearance as heretofore, less strictness might now be admitted as to the proof of the petitioning creditor's debt on opening the fiat.

At the first or opening meeting (which is private and entirely *ex parte* on behalf of the petitioning creditor, and no one can attend to resist or even protest against the proceeding,) on a *town fiat*, to be prosecuted at the Court of Bankruptcy, the commissioner first causes a preamble of the time of holding his Court and opening meeting to be written, as thus:

Preamble to the proceedings at first meeting.

At the Court of Bankruptcy, the 1st day of October, 1834.

Depositions and examinations, and other proceedings had,

(o) *Ex parte Cor*, 1 Dea. & Chit. 205; 1 Mont. & Bligh's Rep. 265.
Mont. Bank. Cas. 390. (q) *Re Wood*, 1 Mont. 509.
(p) *Ex parte Ross*, 1 Dea. & Chit. 552;

CHAP. V.
SECT. XIII.

Memorandum of
a commissioner
on a *country*
bankruptcy
having qualified
himself to act
by taking the
oath pursuant
to the statute.

made and taken under a prosecution of bankruptcy issued against C. D., late of, &c. In case of a *country* proceeding, then follows a memorandum to the following effect:—

Memorandum, That I, G. H., Esquire, being nominated and appointed in and by a prosecution of bankruptcy awarded and issued against C. D., of, &c., bearing date the ——— day of ———, A. D. 1834 instant, did take the oath prescribed by an act made on the 30th day of October, 1831, for commissioners to take before they proceed in any prosecution of bankruptcy.

G. H.

Witness, Y. Z.

Form of oath
to be adminis-
tered by the
commissioners
to the witnesses
upon their ex-
amination un-
der a town or
country fiat.

The depositions
of the petition-
ing creditor's
debt, and of the
trading and
act of bank-
ruptcy.

“ You shall true answer make to all such questions as shall be put to you by virtue of this prosecution of bankruptcy awarded against C. D. So help you God.” The deponent is thereupon to kiss the book, i. e. the *New Testament*, if a Protestant, and the *Old Testament*, if a Jew.

[Then follow, *first*, the petitioning creditor's deposition as to *his debt*, in compliance with his bond; *secondly*, the deposition of some third person as to the *trading*; *thirdly*, the deposition of a third person as to the *act of bankruptcy*. See several forms, Eden's Bank. L. 3d edit. 114 to 120; Stewart's Bank. L. 135, 136.]

If the commissioner be satisfied as to the sufficiency of the petitioning creditor's debt, trading and act of bankruptcy, he then *adjudicates* that the party has become a bankrupt to the following effect.

The form of
Adjudication.

At the Court of Bankruptcy, the ——— day of ———,
A. D. 1834.

Memorandum. I, G. H., Esquire, one of the commissioners of his Majesty's Court of Bankruptcy, [*or if in the country*, “ being a commissioner named and authorized in and by a fiat awarded and issued against C. D., late of ———,”] upon good proof upon oath before me this day had and taken, do find that the said C. D. became a bankrupt within the true intent and meaning of the statute made and now in force concerning bankrupts, before the date and suing forth of the said fiat, and I do therefore declare and adjudge him bankrupt accordingly.

G. H.

Warrant of
seizure.

At the same meeting the commissioner signs and seals his *warrant of seizure* of the bankrupt's estate and effects, addressed to a messenger and his assistant, and to all mayors, bailiffs, constables, headboroughs, and all other his Majesty's

subjects; (r) and there may also be his *search warrant* under his hand and seal. (s)

CHAP. V.
SECT. XIII.

The commissioner at the same time appoints *two* days for *public meetings*, to receive and prove debts, and to take the bankrupt's surrender and examination. The *first* meeting for the choice of assignees, as well as the proof of debts, and the *last* meeting (which must be on the 42d day from the advertisement in the Gazette,) as well for the proof of debts as for the bankrupt's surrender and examination; but the bankrupt usually surrenders at the first meeting, for the sake of being protected from arrest; or he may surrender at the private meeting, which protects him until he has passed his examination. (t)

Appointment
of the two pub-
lic meetings.

At the private opening meeting also the commissioner is to elect, by ballot, an *official assignee*, as directed by the 18th General Rule of 12th January, 1832; and he is thereupon, according to rule 20, by instrument under his hand, to appoint an official assignee to the particular bankrupt's estate, and which appointment is to remain of record in the said Court of Bankruptcy; and certificates of such appointment, under the seal of the Bankrupt Court, are to be delivered to such assignee by the registrar, upon application for the same. And the commissioner may, under rule 25, give such special instructions to the official assignee as he may think the nature of the bankrupt's estate, or the particular case, in other respects, may require.

Appointment of
the *official as-*
signee, &c.

Immediately after the adjudication of bankruptcy, should be prepared an *advertisement* of the fiat, the appointment of the two meetings at which the bankrupt is to surrender, and at either of which the creditors are to prove their debts, and at the first choose assignees, and at the last the bankrupt to finish his examination, and requiring all persons indebted to the bankrupt, or who have any of his effects, not to pay or deliver the same to the bankrupt, but to the official assignee, (describing him by name and residence,) or to give notice to the solicitor under the commission, naming him and his residence. (u) This advertisement must be *inserted* in the London Gazette, and the forty-two days are reckoned from that insertion. But a *memorandum* only of the appearance of the advertisement in the Gazette, and of the date thereof, with proper reference to the file to facilitate search, is to be made by the deputy registrar, in

Advertisement
in Gazette.

(r) See form, Eden, B. L. 3d ed. 120;
and 6 G. 4, c. 16, s. 27, 28, 29.
(s) *Ibid.* 121.

(t) Eden, 3d ed. 122.
(u) See form, Eden, B. L. 3d ed. 120.

CHAP. V.
SECT. XIII.

lieu of attaching a copy of the Gazette in the proceedings under the fiat. (x) The bankrupt is also to be *served* with a *formal summons* to attend at the two appointed meetings, then and there to be examined, and to make full and true discovery and disclosure of his effects, according to the directions of 6 Geo. 4, c. 6. (y)

FIRST PUBLIC SITTING.

Memorandum
of bankrupt
having surren-
dered, and
consequences.

At the *first public meeting*, or sitting, upon a town fiat, there is to be an entry upon the proceedings of a memorandum of the bankrupt having surrendered and submitted himself to be from time to time examined; and there is usually a further memorandum that the bankrupt, having been sworn and examined, states that he is not at present prepared to make a full disclosure and discovery of his estate and effects, and therefore prays further time for the doing thereof until the next day appointed in the London Gazette for that purpose. (z) And thereupon, in order to protect the bankrupt from arrest, the commissioner usually indorses a memorandum on his summons, that the bankrupt has so surrendered and prayed further time, and the grant thereof. (a)

Proof of debts.

The next proceedings are the *proofs of debts* and entries of *claims* by all the creditors who may think fit to attend at the first public meeting, with a view also of voting in the choice of assignees. (b) Formerly, except in some cases of illness and others requiring indulgence, every creditor *must have attended in person*, and sworn to and signed a written deposition of his debt, shewing the amount above 100*l.* and the consideration, and sometimes the time when it completely accrued due, and certainly before the act of bankruptcy. (b) But now we have seen that in all cases *any* creditor may make *proof of his debt by affidavit* sworn before one of the said judges of the Court of Review, or Commissioners, or before a Master in Chancery, ordinary or extraordinary; or in a particular prescribed manner, if living abroad; subject nevertheless to such rules and orders touching the *personal* attendance of every creditor, to make such proof according to the existing laws and practice in bankruptcy as the said Court of Review, with the consent of the Chancellor, shall from time to time make. (c)

(x) Rule 16 of 12th January, 1832.

(y) See form of Summons, Eden, B. L. 121.

(z) See forms, Eden, B. L. 3d ed. 122.

(a) See forms, *ibid.*

(b) Eden, 3d ed. 123.

(c) 1 & 2 W. 4, c. 56, s. 34.

The usual proof under a London fiat at the *first* public sitting is by the creditor in person, (d) because after proving he is at the same sitting to vote in the choice of the creditors' assignees, as directed by 1 & 2 W. 4, c. 56. (e) Each separate creditor makes a written *deposition* of his debt, which he is sworn to and signs; and he must at the time of proving state whether he has any security, and if he has, it must then be produced and exhibited; and where he has a security only from the bankrupt he must deliver it up for the benefit of the creditors before he can prove; but when another party is liable thereon, the creditor has a right to detain the security, in order to recover against him to the full extent of 20s. in the pound. (f) When the creditor appears in person he must produce all securities, which must be excepted in the deposition, and the form of proof will be as in the note. (g)

If the creditor should reside a considerable distance in the country, or if residing in or near London he should prefer proving by *affidavit* under the permission of 1 & 2 W. 4, c. 56, s. 34, he may do so in the first instance; but still he may, under the same section, be required to attend in person, so as to be examined as to the sufficiency of the debt. The form of affidavit may be as in the note. (h)

At such *first* sitting the *choice of assignees* is to take place by the creditors present who have proved their debts. (i) By the 6 G. 4, c. 16, s. 61, all creditors who have proved their debts of

Choice of the
creditors' as-
signees.

(d) 6 G. 4, c. 16, s. 46. The 1 & 2 W. 4, c. 56, s. 34, gives the general power of proving by affidavit.
(e) S. 20.

(f) Eden, 3d ed. 123.
(g) See several forms, Eden, 3d ed. Appendix, 124; Stewart's Bkpt. Law, 147.

At the Court of Bankruptcy, London, 1st October, 1834.

A. B. of, &c., being sworn and examined the day and year and at the place above-mentioned, upon his oath saith, that C. D., the person against whom this prosecution of bankruptcy is awarded and issued, was at and before the date and suing forth of the same, and still is, justly and truly indebted to this deponent and G. H., his partner, in the sum of £—, for [here state the consideration of the debt, as goods sold and delivered by this deponent and the said G. H. to the said C. D.], and for which said sum of £—, or any part thereof, he, this deponent, hath not, nor hath his said partner, nor any other person to their use, to his knowledge or belief, received any security or satisfaction whatever.

Form of proof of
a debt for goods
sold by a cre-
ditor in person.

Signature, A. B.

(h) In the matter of C. D., bankrupt.

A. B. of, &c., maketh oath that C. D. of, &c., against whom this prosecution of bankruptcy is awarded and issued, was at and before the date and suing forth of the same, and still is, justly and truly indebted to this deponent in the sum of £—, for goods sold and delivered by the said deponent to the said C. D. And this deponent further saith, that he hath not, nor hath any person for his use, had or received any manner of satisfaction or security whatsoever for all or any part of the said sum of £—.

Form of affida-
vit on which to
prove a debt.

Signature, A. B.

Sworn at Manchester aforesaid,
this — day of —, A.D. 1834,
before me,

1st November, 1834.

Y. Z. a Master Extraordinary.

Exhibited to me,

O. P.

(i) 1 & 2 W. 4, c. 56, s. 20. Formerly the choice of assignees was at the *second* meeting, under 6 G. 4, c. 16, s. 61.

CHAP. V.
SECT. XIII.

10% or upwards are entitled to vote in the choice of assignees, which is determined by the majority in value of those who vote. One creditor may choose himself, if his debt be sufficiently large; and it is not necessary that an assignee should be a creditor. But the commissioner may reject any person so chosen, who shall appear to him unfit to be an assignee, and thereupon there is to be a new choice. (k) After the choice of assignees has been completed a *memorandum* thereof is written as part of the proceedings, and the assignees usually *subscribe* their acceptance of the trust, as thus: (l)

In the Bankruptcy of C. D.

1st December, 1334.

At, &c.

Memorandum
of the choice of
assignees.

Memorandum. This being the day appointed in the London Gazette for the choice of assignees of the estate and effects of C. D.: We whose names are hereunder written, being the major part of the creditors of the said C. D., present at this meeting, and who have proved our debts to be 10% and upwards, have chosen and do hereby nominate and choose L. M. and N. O. of London, merchants, to be assignees of the estate and effects of the said C. D.

A. B. for self & Son.

E. F. for self & Co.

G. H.

O. P.

Q. R., &c. &c. &c.

We accept of the said trust, and promise to execute a counter part of the said assignment. (m)

L. M.

N. O.

Second public
sitting and sub-
sequent pro-
ceedings.

At the *second* sitting the remaining debts are usually proved or claimed, and the bankrupt usually passes his last examination.

Dividends.

No *dividend* is to be made until after four months from the issuing of the fiat, nor later than twelve months; and there must be twenty-one days' notice in the Gazette before making it, and the accounts of the assignees must be first audited. (n)

Certificate.

The number of creditors who must sign the bankrupt's *certificate* depends on the *time*; until six months after the last

(k) 6 G. 4, c. 16, s. 61; Eden, 3d ed. 131, 132.

(l) Eden, 3d ed. 132.

(m) This form is continued in Stewart's

Bank. Law, 166; but since the 1 & 2 W. 4, c. 56, s. 25 & 26, no assignment is necessary.

(n) 6 G. 4, c. 16, s. 107.

examination have expired, the signature must be by *four-fifths* in number and value of the creditors for 20l.; but *after* six months, it suffices if the certificate be signed by *three-fifths* in number and value, or nine-tenths in number only. (n)

It will be observed that in this summary, after stating the previous law and the *change in the practice in bankruptcy* introduced by 1 & 2 W. 4, c. 56, and the general rules and orders thereon, principally of 12th January, 1832, we have merely considered the *ordinary course of practice* in obtaining the fiat, opening the same, obtaining adjudication of the bankruptcy, the proceedings at the *first* public sitting for the proof of debts, mode of proof, and choice of assignees; and the *second* or last public meeting, and the law respecting dividends, and signing the certificate. The above concise consideration of these must suffice, as the statement of the whole law would occupy the space of two or three volumes, and exceed the limits of the scale of this work.

SECT. XIV.—*Of Courts of Error and of Appeal from the Decisions of the preceding and other Courts.*

Having thus considered the *jurisdiction* and *general practice* of *eleven* of the *principal Courts in England*, which were constituted for the purposes of distinct *original* jurisdictions of various descriptions, *viz. legal*, whether civil or criminal, *equitable*, *ecclesiastical*, *maritime*, *international*, or prize, and of *bankruptcy*, and some of which have also jurisdiction as Courts of Appeal and Error from Inferior Courts; we have now to examine the jurisdiction and general practice of those Courts, which have little if any *original* jurisdiction, but act and decide only as Courts of Error or Appeal from the judgments or the proceedings of the other Courts, which we have thus examined, and from the decisions and acts of various foreign Courts. For this purpose there are the three Courts, 1st, Of Exchequer Chamber; 2dly, The Court of the Judicial Committee of the Privy Council; and, 3dly, The Judicial Court of the House of Lords. The *first* is merely a Court of Error from the final judgments of the Superior Courts of *Law*, as from the King's Bench, Common Pleas and Exchequer, in actions *commenced* in one of those Courts. (o) The *second* has no appellate jurisdiction either from the superior Courts of Law or of Equity, but has appellate jurisdiction principally from the Ecclesiastical Courts of England, the Admiralty Court, and the almost innumerable Courts in his Majesty's islands and dominions

Of these Courts
in general.

(n) 6 G. 4, c. 16, s. 122; Eden, 3d ed. 396. (o) *Ricketts v. Lewis*, 1 Cro. & J. 11.

CHAP. V.
SECT. XIV.

General obser-
vations.

First,
EXCHEQUER
CHAMBER.

abroad; whilst the third has *appellate jurisdiction*, not only from the decisions of the Exchequer Chamber upon the judgments of the Court of King's Bench, Common Pleas and Exchequer, in actions there *commenced*, but also upon the judgments of the King's Bench in error from inferior Courts, and also on appeals from decrees in the Equity Courts, which we have before considered, and upon appeals and writs of error from Scotland and Ireland.

We propose at present to confine our observations principally to the *jurisdiction* of these Courts of Error and Appeal, and the *general* course of practice therein. The *detail* of all the *practical* modes of conducting proceedings in error or appeal will be more properly arranged in the concluding parts of this work.

First, The Court of Exchequer Chamber.

The 1 W. 4, c. 70, s. 8, we may remember, materially alters the previous enactments and law regulating writs of error, and enacts, "that writs of *error* upon *any judgment*, (o) given by " *any* of the said Courts, (i. e. the King's Bench, Common " Pleas and Exchequer of Pleas,) shall hereafter be made re- " turnable *only* before the judges, or judges and barons, as the " case may be, of the *other two Courts* in the Exchequer " Chamber, any law or statute to the contrary notwithstanding; " and that a *transcript* of the record only shall be annexed to " the return of the writ; and the Court of Error, after errors " are duly assigned and issue in error joined, shall at such time " as the judges shall appoint, either in term or *vacation*, *review* " *the proceedings*, and give judgment as they shall be advised " *thereon*; and such proceedings and judgment, as altered or " affirmed, shall be entered on the *original record*; and such " further proceedings as may be necessary thereon shall be " awarded by *the Court in which the original* record remains; " from which judgment in error no writ of error shall lie or be " had, except the same be made returnable in the High Court " of Parliament."

Every word of this enactment demands attentive consideration, as it so materially alters the previous practice in error. Formerly, very absurdly, a writ of error upon the judgment of the *Court of Common Pleas* was always returnable in the King's Bench, (although the judges of the former Court usually are as competent to decide upon the matter of law as those of the

(o) But this does not extend to errors in judgment on a matter of *fact*, as for *infancy* or *coverture* of the defendant, when a writ of error *coram nobis* or *vobis* must still be brought in the same or next Su-

perior Court as heretofore; nor do those writs extend to judgments in error of the King's Bench upon judgment of an *inferior* Court, *post*.

latter,) and whether the judgment of the Common Pleas was reversed or affirmed, a further writ of error from such judgment of the King's Bench was afterwards returnable in the House of Lords, without being previously examined in the Exchequer Chamber. (p) From a judgment in the King's Bench, when the action had been commenced *by bill* or *latitat*, the writ of error was returnable in the Exchequer Chamber, except in replevin and a few other actions; (q) but if it had been commenced by *original*, then it was to be returnable in Parliament, without any intervening examination in the Exchequer Chamber; (r) and from the judgment of the Exchequer of Pleas, the writ of error was returnable in the Exchequer Chamber, before the Lord Chancellor, Lord Treasurer, and the Judges of the Courts of King's Bench and Common Pleas. But *now*, by the above enactment, a writ of error, in respect of any matter merely of *law*, upon *any* judgment of the Court of King's Bench, Common Pleas, or law side of the Exchequer, in an action *commenced* in either of those Courts, is to be returnable *only* in the Exchequer Chamber, before a Court holden before *different judges*, according to the Court, the judgment of which is to be impeached, viz., before the judges, or judges and barons of the two Courts, who had not given the judgment, and the attendance of the Chancellor and Lord Treasurer is in all cases dispensed with. So that since this statute the judges of the King's Bench and the barons of the Exchequer of Pleas constitute the only Court of Error upon a judgment of the Common Pleas; the judges of the Common Pleas and such barons constitute the Court of Error upon a judgment of the King's Bench; and the judges of the King's Bench and Common Pleas constitute the Court of Error upon a judgment of the Exchequer of Pleas; and from all judgments in error of the Court of Exchequer Chamber the writ of error lies only to the House of Lords. But the term *any* judgment is not so comprehensive as might be supposed, for it is qualified by the *subsequent* words in the same section, requiring the Court of Error to *review* the *proceedings* and give judgment *thereon*; which words impliedly confine the words *any* judgment to objections apparent on the face of the record, and do not extend to errors *in fact extrinsic* from the record, and therefore this section is confined to judgments *defective in law* upon the *face of the pleadings and whole record*, without regard to *extrinsic facts*, and the statute does not extend to what are termed errors in

(p) 3 Bla. Com. 411; 1 Rol. R. 264;
2 Bulstr. 162.

(q) 27 Eliz. c. 8.

(r) 4 Inst. ch. 1, p. 22; 2 Hen. Bla.
204; 1 Saund. 346 f, note 4.

CHAP. V.
SECT. XIV.First,
EXCHEQUER
CHAMBER.

fact, which are not apparent on the face of the record, but consist of some *extrinsic fact*; such as *infancy* of the defendant, who had appeared and been defended by an attorney, and the objection was not raised until after judgment, (s) or *coverture*, (t) or *death* of a defendant before verdict. (u) In these cases a writ of error coram nobis or vobis is, notwithstanding this statute, still returnable in the same Court in which the judgment was given, or in the King's Bench as heretofore. (x) Another reason has been assigned why the 1 W. 4, c. 70, s. 8, does not extend to writs of error coram nobis or vobis, viz., because those writs of error only contain a commission to try errors, and no certiorari. (y) It has also long been supposed that no writ of error for error *in fact* can be brought in the Exchequer Chamber or House of Lords. (z) Nor does a writ of error lie from the judgment of the Court of King's Bench, reversing or affirming the judgment of an *inferior Court*, but in that case the writ of error lies direct from the King's Bench to the House of Lords. (a)

It will be observed that the original record itself is to remain in the Court in which the original judgment was given, and only a copy of the pleadings and proceedings, termed a *transcript*, is to be sent to the Exchequer Chamber, and thereupon the supposed errors are assigned, and joinder in error takes place in that Court, and after the judges there have given their judgment, the same is to be entered on the original record in the Court where it remains, and execution is to be issued by the latter Court.

In general all judicial acts must be performed in *term time*, but this act, it will be observed, enables the judges constituting the Court of Error to review the proceedings, and give their judgment of reversal or affirmance in *vacation*. (b) That enactment was to enable the judges to fulfil their arduous judicial duties in their own Courts during the terms, and to select some more convenient day or days in vacation for hearing the arguments, and deciding upon such transcripts in error.

It will be observed that the judges of the Court of Error are merely to *review* the *proceedings*, and give judgment as

(s) Style, 406; *Bird v. Pegg*, 5 B. & Ald. 418; when not, *Goodright v. Wright*, 1 Stra. 33.

(t) Rol. Ab. 747, 748, 752; Style, 254, 280; Rol. R. 53.

(u) 2 Saund. 101.

(x) *Castledine v. Mundy*, 4 B. & Adol. 90; *Binns v. Pratt*, 1 Chit. R. 369, *ante*, 360.

(y) 1 Dowl. Statutes, 375, referring to

Tidd's Forms, c. 44, s. 2 to 6.

(z) Per Lord Holt, C. J. Shower's R. 171, 177; *Hopkins v. Wrigglesworth*, 2 Lev. 58; 2 Saund. 101 a; *sed quare post*, *House of Lords*, 593, n. (g).

(a) *Ricketts v. Lewis*, 2 Crompt. & J. 11; 2 Tyr. R. 15, S. C.

(b) There was a similar power to hear and determine in *vacation* created by 3 G. 4, c. 102, s. 2 & 4.

they shall be advised *thereon*. A writ of error is therefore only sustainable in the Exchequer Chamber in respect of some *substantial apparent objection*, not aided either at common law or by any statute of jeofails, and which can be discovered upon *reading the transcript* or copy of the *proceedings* of the Court below, and consequently never on account of any *extrinsic fact or objection*. The only tenable objections are such *substantial defects* in the *pleadings* of the party in whose favour the judgment below has been given, as are not aided after verdict or judgment by default or for want of a special demurrer, as required by 4 Anne, c. 16; or in respect of defects in *legal merits* in the case itself as disclosed by a *demurrer to the evidence*, *bill of exceptions*, or *special verdict*, (and not upon a mere special case or matter disclosed upon some *collateral* motion, rule nisi, or rule absolute, which never are entered upon the roll of proceedings nor appear therefrom,) each of which is considered as part of the original record, and must appear on reading the whole transcript. The Court of Exchequer Chamber is not a Court of *Appeal*, so as to re-investigate the *merits* upon any matter of *fact*, as we shall see the Judicial Committee of the Privy Council is, and it has therefore no power to convene a jury or to institute any collateral inquiry. As constituted of the learned judges of the *two* Courts, instead of the four judges of the Court below, it is supposed that this Court will arrive at a more certainly correct and satisfactory decision than such Court below; and it is confined by the very terms of the statute to the examination of the *transcript*, and deciding upon the sufficiency of the judgment *thereupon* given.

Since the act 1 W. 4, c. 70, it has been held, that a writ of error subsequently sued out on 27 Eliz. c. 8, was coram non judice; (c) and after a judgment in King's Bench upon a writ of error from the Common Pleas, or from an inferior Court, no writ of error lies to the Court of Exchequer Chamber, as constituted by 1 W. 4, c. 70, s. 8. (d)

In ordinary cases, when the pleadings are common and simple, it can scarcely ever occur that a writ of error in the Exchequer Chamber can be sustainable; but when the declaration or special plea is special, substantial defects not unfrequently arise, and the judgment may then, on writ of error in the Exchequer Chamber, be reversed.

There may, however, be a writ of error founded on matters of *fact* when disclosed by a *bill of exceptions*, signed by the judge

(c) *Gurney v. Gordon*, 2 Tyr. R. 16.

(d) *Ricketts v. Lewis*, 2 Tyr. R. 15; 2 Crompt. & J. 11, S. C.

CHAP. V.
SECT. XIV.First,
EXCHEQUER
CHAMBER.

who tried the cause, and which by annexation becomes part of the entire record, (e) or by a *demurrer to evidence*, or by a *special verdict*; and on a bill of exceptions the Court of Error may look to the whole evidence on both sides, to see whether the verdict was sustained by the evidence, and whether upon the *whole record with its annexations* the party was entitled to judgment. (f) But it has been recently held in the House of Lords that, in arguing a writ of error, the counsel can rely only upon objections especially suggested to the judge, and raised by the bill of exceptions, and the same reason applies to writs of error, returnable in the Exchequer Chamber. (g)

One general rule prevails in all Courts of Error, and certainly in the Exchequer Chamber and House of Lords, viz. not to inquire into the propriety of the *rules and practice* of a Court below, for regulating either its *general practice*, or a proceeding in a particular cause, as for amending a declaration, striking out pleas, or granting a new trial. (h) Tindal, C.J. observed, (i) "the practice of the Courts below is a matter which belongs by law to the *exclusive discretion* of the Court itself; it being presumed that such practice will be controlled by a sound legal discretion. It is therefore left to their own government alone, without any appeal to or revision by a superior Court." (k)

(e) 3 Tyr. R. 509.

(f) Per Bayley, B. in *Smith v. Latham*, 3 Tyr. R. 527; *Vines v. Corporation of Reading*, 1 Young & J. 4.

(g) *Lucas v. Nockells*, cited in *Wright v. Tatham*, 1 Adol. & Ellis's R. 7, note (a) and 15; and see *post*, 577, 578.

(h) *Gulley v. Bishop of Exeter*, 10 B. & C. 584; *Mellish v. Richardson*, 9 Bing. 126.

(i) *Mellish v. Richardson*, 9 Bing. 126.

(k) The opinion of the judges in a recent case upon the limited powers of a Court of Error as delivered by Tindal, C. J. are so exceedingly illustrative, that it is expedient here to transcribe them.* His lordship observed, "the questions proposed by your lordships to his Majesty's judges are these, viz. first, whether it is competent to a Court of Error to examine the propriety of an amendment of the record made by the Court below, being a Court of Record, the order for the amendment being sent up as part of the record; secondly, whether, supposing it to be competent, an amendment made by the Court of Record in which the action was originally brought, in the manner and under circumstances similar to those stated in the case of *Mellish v.*

Richardson, would be lawfully made. Upon the first of these questions his Majesty's judges are of opinion, that it is not competent to a Court of Error to examine the propriety of an amendment of the record made by the Court below, being a Court of Record, although the order for the amendment is sent up as part of the record.

"The proper object of a writ of error is to remove the final judgment of the Court below for the revision of the superior Court, in order that such Court, from the premises contained in the record of the inferior Court, may either affirm or reverse the judgment, as they draw the same or a different conclusion from that which has been pronounced by the Court below.

"These premises are the pleadings between the parties, the proper continuance of the suit and process, the finding of the jury upon an issue in fact, if such has been joined, and lastly, the judgment of an inferior Court.

"All these premises, from which such judgment has been derived, the parties to the suit below have the right *ex debito justitiæ* to have upon the record.

"But the orders or rules for amend-

* *Mellish v. Richardson*, 9 Bing. 126.

2. *The Judicial Committee of the Privy Council.*Second,
JUDICIAL
COMMITTEE OF
PRIVY COUN-
CIL.

It has been shewn in a preceding page that formerly the Court of Delegates, and from thence occasionally a Commission of Review, were the Courts of *Error*, or rather of *Appeal*, from the decrees and proceedings of the Superior *Ecclesiastical* Courts, and of the Court of *Admiralty* and *Prize* Courts, and from most *foreign Courts*; (*k*) but that these were repealed by 2 & 3 W. 4, c. 92, which also enacts that no Commission of *Review* shall be granted, and that in lieu of an appeal to the delegates, or any Commission of Review, the 3 & 4 W. 4, c. 41, constitutes "*The Judicial Committee of the Privy Council*" the Court of Appeal, not only from the *Ecclesiastical* Courts, but also from the *Admiralty* Court and *Prize* Court, and most of the Courts in the *foreign dominions* of his majesty. (*l*)

The first section of this important act declares and enacts what persons shall constitute the judges of this new Court, and

ment of proceedings made by a Court in the progress of a suit therein depending, do not fall within the description of any part of the record; but such orders are strictly and properly matters of practice in the progress of the cause, regulated by the power of amendment which the Courts of law possess, either by the common law, or by the statutes of amendment which have been from time to time enacted by the legislature for that purpose.

"The practice of the Courts below is a matter which belongs by law to the exclusive discretion of the Court itself; it being presumed that such practice will be controlled by a sound legal discretion. It is therefore left to their own government alone, without any appeal to or revision by a superior Court. And we cannot but observe, that no precedents have been cited at the bar in which an entry similar to that contended for by the plaintiff in error is to be found.

"So strictly has the law considered that the pleadings in the suit, and the judgment proceeding thereon, shall form the only grounds of the record, that when it was found expedient that the opinion in point of law of the judge who tried the cause should be made the subject of revision by a superior Court, the Statute of Westminster the second (13 Edw. 1) expressly gave authority for that purpose by a bill of exceptions.

"We think, therefore, that it is not competent for the superior Court to examine into the propriety of the amendment, which is left to the sole discretion of the Court by which it has been

made. And if this be so, then the circumstances for the orders for the amendments being put upon the record in this instance, cannot have the effect of giving competency to the superior Court to revise the propriety of such amendment. For if the grounds of the amendment are not in themselves removable by the writ of error, and if the parties to the suit have not *ex debito justiciæ* the right to put the rules and orders for the amendment upon record, then the superior Court would have, or would not have, authority to inquire into the propriety of the amendments, according as the inferior Court did or did not return, in the particular instance, the order by which the amendment is made.

"One of his Majesty's justices has felt some doubt and difficulty in acceding to this opinion, but upon the whole acquiesces in its propriety.

"Such being the opinion of the judges on the first question submitted to them by your lordships, it becomes unnecessary for them to offer any upon the second."*

(*k*) And see 3 Bla. Com. 66 to 71.

(*l*) *Ante*, 309; and see the statute 3 & 4 W. 4, c. 41, and orders, with the valuable notes of Mr. Knapp, in his reports of decisions in the Privy Council, vol. ii. Appendix, v. to xxv. Those reports contain the decisions in the Privy Council, and all students of law desirous to extend their knowledge, especially as regards the *principles* of law, will do well to read those reports, together with Mr. Knapp's sensible and accurate notes.

* *Mellish v. Richardson*, 9 Bing. 125.

CHAP V.
SECT. XIV.2. JUDICIAL
COMMITTEE OF
PRIVY COUN-
CIL.

fixes its style. It in part recites the 2 & 3 W. 4, c. 92, for transferring the power of the High Court of Delegates, both in ecclesiastical and maritime causes, to his Majesty in Council; and that by letters-patent, certain persons, members of his Majesty's Privy Council, together with others, being judges and barons of his Majesty's Courts of Record at Westminster, had been appointed to be his Majesty's Commissioners, for receiving, hearing and determining appeals from his Majesty's Courts of Admiralty in causes of *Prize*, (m) and that from the decisions of various Courts of judicature in the *East Indies*, and in the *plantation colonies* and other dominions of his Majesty abroad, an *appeal* lies to his Majesty in Council; and that matters of appeal or petition to his Majesty in Council *had usually been heard before a committee* of the whole of his Majesty's Privy Council, who had made a report to his Majesty in Council, whereupon the final judgment or determination had been given by his Majesty; and reciting that it then was expedient to make certain provisions for the *more effectual hearing and reporting* on appeals to his Majesty in Council, and on other matters, and to give such power and jurisdiction to his Majesty in Council as thereafter mentioned, then enacts and declares *the persons who* shall form a committee of his Majesty's said Privy Council, and enacts that they shall be styled "*The Judicial Committee of the Privy Council*," and then empowers his Majesty by his sign manual to appoint any *two other persons, being privy councillors, to be* members of such committee. The persons enumerated, who *virtute officii* are to be members of such committee, are at least *eleven*, viz., the President of the Privy Council, Lord Chancellor, Lord Keeper, or First Lord Commissioner of the Great Seal, the Chief Justice of the King's Bench, Master of the Rolls, Vice-Chancellor, Chief Justice of the Common Pleas, Chief Baron of Exchequer, Judge of the Prerogative Court of the Archbishop of Canterbury, Judge of the Court of Admiralty, and Chief Judge of the Court of Bankruptcy, and every other member of the Privy Council, *who has filled* either of those respective high offices; and the concluding part of section five enables his Majesty to summon any *other member* of the *Privy Council* to attend the meetings of such committee.

The fifth section enacts that at least four members of such committee shall be present, viz., "that no matter shall be heard, " nor shall any order, report, or recommendation be made by

(m) And see 22 G. 2, c. 3; and 2 R. 608; *ante*, vol. i. 818, as to questions Knapp's R. ii. note *; and see *Hill v.* of prize.
Reardon, 2 Sim. & Stu. 431; and 2 Russ.

" the said Judicial Committee, in pursuance of that act, *unless*
 " *in the presence of at least four members of the said commit-*
 " *tee*; and that no report or recommendation shall be made to
 " his Majesty, unless a *majority* of the members of such Judi-
 " cial Committee present at the hearing *shall concur* in such
 " report or recommendation."

CHAP. V.
SECT. XIV.

2. JUDICIAL
COMMITTEE OF
PRIVY COUN-
CIL.

The sixth section enacts, " that in case his Majesty shall re-
 " quire the attendance at the committee of any member of the
 " Privy Council, who shall be a judge of either of the superior
 " Courts, such arrangement shall be made by the judges for
 " dispensing with the attendance of such judge, upon his
 " ordinary duties, as may be necessary and consistent with the
 " public service." And with the same object the twenty-fifth
 section empowers his Majesty to appoint one of the barons
 of Exchequer to sit in equity, in the absence of the chief
 baron, when attending the Judicial Committee of the Privy
 Council. (n) And the twenty-sixth section enables two judges of
 the Court of Review, during the absence of the chief judge
 of that Court, to form a Court of Review in bankruptcy. (o)

The second section enacts, " That all *appeals or applica-*
 " *tions in prize* suits, and in all other suits or proceedings in
 " the Courts of Admiralty or Vice-Admiralty Courts, or *any*
 " *other Court* in the *plantations* in *America*, and *other* his Ma-
 " jesty's *dominions or elsewhere* abroad, which might then be
 " made to the High Court of Admiralty in England, or to the
 " Lords Commissioners in prize cases, *shall be made to his Ma-*
 " *jesty in Council only.*" (p)

(n) And see *ante*, 450, 451.

(o) It will be obvious that if an appeal could be heard *throughout*, and the report thereon unanimously agreed upon *by the eleven* persons thus constituting such Court of Appeal, the decision could not fail to be most satisfactory, because the aggregate of those persons combines the *highest intelligence* upon every subject of litigation that can possibly arise, viz. the principles of common and statute law of England, relative to temporal affairs, whether *civil or criminal*,—the principles of *equitable* rights and remedies, and the principles upon which the ecclesiastical, maritime and international laws are founded, and lastly, the principles of the law applicable to cases of bankruptcy and insolvency; and by the assistance of members of the Privy Council, who *have held* the office of judge in the East Indies, or other his Majesty's dominions beyond sea, a degree of familiar knowledge of foreign laws and customs is, under the thirtieth section of the act, combined, so as to enable the eminent personages hold-

ing the highest stations as judges here, in their various departments, to apply with effect their knowledge to questions upon foreign law that can be brought before them. But the difficulty is in those cases of appeals that are lengthy and cannot be heard and disposed of at one meeting of this judicial committee to secure the attendance throughout of the *same distinguished personages* to the *whole* of the hearing and discussion of a case, before the report thereon is made, and which is so essential to the perfection of justice. See an instance in *Long v. Commissioners for Claims on France*, 2 Knapp's R. 59, note *; and see the Lord Chancellor's observations on the defective state of administering justice in the House of Lords, *post*, 587, note (h).

(p) Before this enactment it was held in *The Fabius*, 2 Rob. R. 249, that appeals from the Vice Admiralty Courts in the colonies were properly laid to the High Court of Admiralty and not to the Privy Council.

CHAP. V.
SECT. XIV.2. JUDICIAL
COMMITTEE OF
PRIVY COUN-
CIL.

The Courts
from whose
proceeding an
appeal may lie.

The third section enacts, "That all *appeals, or complaints*
" *in the nature of appeals*, which might previously have been
" brought before his Majesty in Council, from or in respect of
" the *determination, sentence, rule or order of any Court, judge*
" or *judicial officer*, shall be referred to the said Judicial Com-
" mittee, and shall be heard by them, and a report or recom-
" mendation thereon shall be made to his Majesty in Council,
" for his decision thereon, as heretofore, in the same manner
" as had been theretofore the custom with respect to matters
" referred by his Majesty to the whole of his Privy Council,
" or a committee thereof, *the nature of such report or recom-*
" *mendation being always stated in open Court.*"

Upon the effect of the first part of this section it has been observed, that it would be difficult to enumerate *all the Courts*, whose decision, previously to the passing of this act, might have been brought before the King in Council, and which, *under* this act, may not be referred to the Judicial Committee. They may be classed under three heads; as, *first*, Courts within the kingdom; *secondly*, Courts of the islands near the kingdom; and, *thirdly*, Courts in distant dominions of his Majesty. Those of the *first*, are appeals from the decision of the Lord Chancellor in England and Ireland, sitting *in lunacy*; (q) and from the Court of the Warden of the Stanneries in Cornwall, if there happened to be no Prince of Wales, to whom in his council as Duke of Cornwall the appeal properly lies; (r) *secondly*, appeals lie to the Privy Council from the Isle of Man and other islands near England; (s) and *thirdly*, are appeals from the *colonies*, as from the East and West Indies, &c. (t) The general rule with regard to appeals from the colonies appears to be, whenever no limitations have been imposed upon them, either by orders in council, or instructions to the governor, or the charters of their Courts, or acts of parliament, that appeals are to be received upon petition to the council, from *all courts* in the King's dominions abroad, on the ground that it is the right of the subject, without express power, to appeal to the sovereign to redress all wrong done to them in any Court of Judicature; (u) but clauses restrictive of or limiting this right of appeal, must of course be construed and given effect to according to the intention of the qualification. (x)

(q) 2 Knapp's R. iv. note †; and see *Grosvenor v. Drax*, 2 Knapp's R. 82, where on an appeal from the Chancellor in lunacy, the Privy Council reversed his order, as made after the death of the lunatic, without jurisdiction, as the proceeding should have been by bill filed.

(r) 2 Knapp's R. iv. note †.

(s) 2 Knapp's R. iv. note †; as to the island of Jersey, see order, 13th May,

1572; 2 Knapp's R. v. in note.

(t) 2 Knapp's R. iv. note †.

(u) 2 Knapp's R. iv. note †; *Christian v. Corren*, 1 P. Wms. 329; see argument in *Cuvillier v. Aylwin*, 2 Knapp's R. 77.

(x) 2 Knapp's R. v. in note, *In matter of Nahon and Pariente*, 2 Knapp's R. 67, and *Austin v. Cuvillier*, id. 72; *In re Tappen*, 2 Knapp's R. 201.

With respect to the *nature* of the *proceeding* to be appealed against, it will be observed that the terms of the third section are comprehensive, and include not only *final sentences*, but all determinations, *rules* and *orders*, which may be interlocutory or in the course of a suit. From a proceeding in England a writ of *error* in general only lies upon a judgment final or interlocutory, as a judgment by default; but this section is obviously more comprehensive, and whenever, independently of this statute, the particular constitution of a foreign Court, or law applicable to it, or the practice, has permitted an appeal from an interlocutory rule, order or other proceeding, this statute clearly authorizes the continuance, and renders an appeal to the Judicial Committee in a similar case sustainable, and it is necessary to ascertain the law applicable to the particular Court. Thus, from Jersey the proceeding appealed against must have occurred *en fin de cause*. In the West Indian and American colonies, where the English law prevails, the practice has been always to admit appeals from all interlocutory orders in Equity, but not from those at common law. A less restricted rule has been observed in the King's Court at Bengal, the words of whose charter direct them to allow appeals from all judgments, decrees, or rules, or orders. (*y*) In the charter of the King's Courts at Madras, Bombay, and Prince of Wales's Island, the words directing the Courts to grant leave to appeal, are from any "judgment or determination," which words it is now settled are not confined, as once supposed, to final judgments, (*z*) unless it clearly appear they were so intended, as in the Charter of Justice granted to the town of Gibraltar, (*a*) or where the right of appeal is by statute or otherwise confined to cases of claims, exceeding a named sum, as 500*l.*, in the Upper and Lower Canada. (*b*) But it is no ground of appeal that the Court below discredited the testimony of the witnesses improperly. (*c*) Nor can the power of Colonial Courts to prevent advocates, who misconduct themselves, from practising before them, be disputed. (*d*) And it seems that objections cannot be made to a decree at the hearing before the Privy Council that were not made in the Court

CHAP. V.
SECT. XIV.

2. JUDICIAL
COMMITTEE OF
PRIVY COUN-
CIL.

From what in-
terlocutory
or final order,
or sentence on
appeal may lie.

(*y*) 2 Knapp's R. iv. v. note †.
(*z*) *Syed Alley v. East India Company*,
1 Knapp's R. 331, in note *; overruling
Johnston v. East India Company, 1 Stra.
18; and 2 Knapp's R. v. in note.
(*a*) *In re Nahon and Pariente*, 2
Knapp's R. 66; *In re Tappen*, 2 Knapp's

R. 201.
(*b*) *Cuvillier v. Aylwin*, 2 Knapp's R.
72.
(*c*) *Santacana v. Ardevol*, 1 Knapp's R.
269.
(*d*) *Justices of Antigua*, 1 Knapp's R.
267.

CHAP. V.
SECT. XIV.
2. JUDICIAL
COMMITTEE OF
PRIVY COUN-
CIL.

below. (e) But where a party has been denied his right to appeal, according to the charter of the Court, through the erroneous construction of it by that Court, the Privy Council will, upon a special petition, grant leave to appeal. (f)

It will be observed, that the concluding part of the *third* section imperatively requires that the *report or recommendation* of the majority of the members of the Judicial Committee shall *always be stated in open Court*; and this accords with the previous practice declared to be, "It is usual at the Privy Council for the presiding law lord to deliver the *grounds of judgment*, which being thus known and reported tend to settle general principles and establish uniformity of decision." (g)

What other
matters may be
referred to
Judicial Com-
mittee.

The 4th section entitles his Majesty to refer to the Judicial Committee for hearing or consideration, any such *other matters* whatsoever, as his Majesty shall think fit, and enacts, that such committee shall thereupon hear or consider the same, and advise his Majesty thereon in manner aforesaid.

The prescribed
time of appeal-
ing.

The 20th section regulates the *time of appealing*, but without fixing any limit, and merely enacts, that where any such time shall be fixed by any law or usage the same shall be observed; and where there is no law or usage on the subject, then within such time as shall *be ordered* by his Majesty in Council, who is also authorized to *alter* any existing rule or order. It is stated that the established usage at the Privy Council has long been, that if an appellant has not presented his petition of appeal within a year and a day after he has obtained permission to appeal from the Colonial Court, the respondent may present a petition to have it dismissed, and obtain an order of course to that effect on the next meeting of the committee to which it stands referred. (h) However, the appellant may petition to dismiss the latter petition, and has been allowed to prosecute his appeal upon reasonable excuse after a delay even of six years. (i) The 22d and 23rd section authorizes his Majesty to direct the East India Company to bring on certain specified appeals, viz. appeals from the Sudder Dewanny Adawlut Courts in the East Indies to a hearing, notwithstanding the death of parties, and to appoint agents and counsel for the different parties in such appeals, and to make such orders for security and payment of costs as his Majesty in Council should think

(e) *Frankland v. M'Gusty*, 1 Knapp's R. 274; and see 1 Adol. & Ellis, R. 15, S. P.

(f) *Elphinstone v. Berdrechund*, 1 Knapp's R. 332.

(g) See the special report of the commissioners appointed to inquire into the practice and jurisdiction of the Ecclesi-

astical Courts, dated 25th Jan. A. D. 1831.

(h) 2 Knapp's Rep. xiii, n. *, where see the further practice as to time.

(i) *East India Company v. Syed Alley*, 1 Knapp's R. 332; and see *Orphans' Board v. Van Rensselaer*, id. 83, 93; and *Ungenholly v. Hunter*, id. 175.

fit. And accordingly his Majesty, by three orders in council of 4th Sept. and 18th Nov. 1833, directed eighteen appeals from Bengal, ten from Madras, and fifteen from Bombay to be brought to a hearing. (k)

The 24th section enabled his Majesty in Council from time to time to make rules and orders regulating the *mode, form, and time* of appeal to be made from the Courts of Sudder Dewanny Adawlut, or any other Courts of judicature in *India or elsewhere* to the eastward of the Cape of Good Hope, and to make regulations for preventing delay in making or hearing such appeals, and as to the expenses attending such appeals, and the amount or value of the property in respect of which any such appeal may be made.

The 19th section authorizes the president of the Privy Council to require the attendance of witnesses and production of documents by writ of *subpœna ad testificandum* or of *subpœna duces tecum*; and in case of disobedience the witness is guilty of a contempt of the Judicial Committee and to the same penalties as if the writ had issued out of the Court of King's Bench. The 9th section directs that every witness shall be examined on oath, or affirmation if he be a Quaker or Moravian, to be administered as therein directed, and that if the witness shall swear falsely he shall be indictable for perjury and punished accordingly.

The 7th section authorizes the Judicial Committee in any matter referred to them to examine *witnesses* by word of mouth and either before or after examination by deposition, or to direct the deposition of any witness to be taken in writing by the Registrar of the Privy Council or by such other person, and in such manner, order, and course as his Majesty in Council or the Judicial Committee shall appoint and direct.

The 8th section authorizes the Judicial Committee to direct that such witnesses shall be examined or re-examined and as to such facts, notwithstanding any such witness may not have been examined or no evidence may have been given on any such fact in a previous stage of the matter; and his Majesty in Council, on the recommendation of the Judicial Committee upon any appeal, may remit the matter which shall be the subject of such appeal to the Court appealed from, to be there re-heard either generally or upon certain points only, and upon such re-hearing to take such additional evidence though before rejected, or reject such evidence before admitted, as his Majesty in Council should direct; and further, that on any such remitting

CHAP. V.
SECT. XIV.

2. JUDICIAL
COMMITTEE OF
PRIVY COUN-
CIL.

Modes of con-
vening witnesses
and production
of documents
before Judicial
Committee, and
contempts and
punishments of
witnesses guilty
of perjury.

The modes of
examining wit-
nesses, &c.

The re-examin-
ation of wit-
nesses upon the
whole or part of
a case.

Power to direct
a feigned issue

(k) See 2 Knapp's Rep. Appendix, xxvii to xxix, at end of second part.

CHAP. V.
SECT. XIV.2. JUDICIAL
COMMITTEE OF
PRIVY COUN-
CIL.Further powers
as to feigned
sues.Trial of such
feigned issue
and directions
as to witnesses,
and evidence
thereupon.

New trials.

Observations
thereon.Regulations
respecting costs
in general, in
discretion of
Judicial Com-
mittee.

or otherwise, it should be lawful for his Majesty in Council to direct that one or more feigned issue or issues should be tried in any of his Majesty's dominions abroad, for any purpose for which such issue shall to his Majesty in Council seem proper.

The 10th section *extends* the power of directing and trying *feigned issues* by enacting, that the Judicial Committee may direct one or more *feigned issue* or issues to be tried in any Court of common law, and either at bar, or before a judge of assize, or at the sittings for the trial of issues in London or Middlesex, and either by a special or common jury, in like manner and for the same purpose as is now done by the Court of Chancery. The 11th section authorizes the Judicial Committee to direct, on the trial of any issue, that the deposition already taken of any witnesses, who shall have died or who shall be incapable of giving oral testimony, shall be received in evidence; and further, that such deeds, evidences, and writings shall be produced, and such facts shall be admitted, as to the said committee shall seem fit; and the 12th section enacts, that the said committee may make such and the like orders respecting the admission of persons, whether parties or others, to be examined as witnesses upon the trial of such issues as the Lord High Chancellor, or the Court of Chancery, has been used to make respecting the admission of witnesses upon the trial of issues directed by the Chancellor or the Court of Chancery; and the 13th section authorizes the committee to grant one or more *New Trials*, and that the evidence of witnesses previously examined shall be admissible, in case of death, mental disease, or infirmity. The power of examining witnesses on interrogatories is also extended to such issues by section 14. Upon this enactment as to feigned issues it has been observed, that before this act the King in Council, on any appeal from a Court of *Chancery*, had jurisdiction to order the trial of an issue in the country from which the appeal came; but that under the present act, the Judicial Committee have the power of directing issues not only in such cases but also on appeals from the *Ecclesiastical, Admiralty, and Prize* Courts, and from the Chancellor in *Lunacy*, and of ordering them to be tried either in England or in any of the colonies, at their discretion. (1)

The 15th section enacts that "*the costs* incurred in the prosecution of any appeal or matter referred to the said Judicial Committee, and of such issues as the same committee shall under that act direct, shall be paid by such party or parties, person or persons, and be taxed by the appointed registrar or

(1) 2 Knapp's Rep. viii. and ix. n. †.

CHAP. V.
SECT. XIV.2. JUDICIAL
COMMITTEE OF
PRIVY COUN-
CIL.

such other person appointed by his Majesty in Council, or the said Judicial Committee *shall direct*." Upon which enactment it has been observed, that in all the colonial Courts leave to appeal is only granted on condition of the appellant's *giving security for the due prosecution* of his appeal, and for the payment of all such costs as may be awarded by his Majesty in Council to the respondents; and leave to appeal is seldom granted by the council except upon the same terms, and that perhaps the only exception is on the rare occurrence of a pauper appellant. (m) From the recent appeals to the Privy Council from India, brought to a hearing in pursuance of the above-mentioned order of council, it appears that from about 800*l.* to 1000*l.* were required to be paid into the Court in India, before leave to appeal to the King in Council is granted.

In the exercise of such discretionary jurisdiction over costs, the Judicial Committee, as might be supposed, are influenced by those general principles that ought to regulate all well constituted tribunals; and therefore, where the same points of law involved in the appeals had been previously determined, to the knowledge of the respondents, against them, and yet they, by not consenting to an amicable compromise, had put the appellants to unnecessary expense and forced them to appeal, costs were given to such appellants. (n)

The 16th section enacts "that the order or decrees of his Majesty in Council, made in pursuance of any recommendation of the said Judicial Committee, in any *matter of appeal* from the judgment or order of any Court or judge, shall be enrolled for safe custody in such manner, and the same may be inspected and copies thereof taken, under such regulations as his Majesty in Council shall direct." The practice appears to be against permitting a *rehearing*. (o)

Decrees to be
enrolled and
copies taken.

The 21st section enacts "that the order or decree of his Majesty in Council, on any appeal from the order, sentence, or decree of any Court of justice in the East Indies, or of any colony, plantation, or other his Majesty's *dominions abroad*, shall be carried into effect in such manner and subject to such limitations and conditions as his Majesty in Council shall, on the recommendation of the Judicial Committee, direct, but pro-

Decrees on ap-
peals from
abroad to be
enforced as his
Majesty in
Council shall on
recommenda-
tion of Judicial
Committee
direct.

(m) 2 Knapp, xl. note *, where see further as to *Costs*. As to the security, *Camberton v. Egroignard*, 1 Knapp, R. 251; see *Henry v. Byan*, *id.* 383; *Bertram v. Godfrey*, *id.* 381; *Craig v. Shand*, *id.* 253.

(n) *Nedham v. Simpson*, 2 Knapp's Rep. 1; and see *Henry v. Byan*, 1 Knapp, 388.

(o) *Nedham v. Simpson*, 2 Knapp, R. 5 and 6.

CHAP. V.
SECT. XIV.2. JUDICIAL
COMMITTEE OF
PRIVY COUN-
CIL.

Existing powers of Chancery or King's Bench or Ecclesiastical Courts, in punishing contempts and compelling appearances and enforcing judgments, decrees, and orders, transferred and extended to Judicial Committee and to Privy Council.

Power of the King to appoint a registrar of Judicial Committee.

Regulates the right of the registrar of Court of Admiralty to attend.

Regulations in treaties preserved.

Orders in Council, 9 Dec. 1833.

vides that the act shall not in any respect abridge the powers of the whole Privy Council."

The 28th section enacts that the Judicial Committee shall enjoy all the powers of punishing contempts, and of compelling appearances, and his Majesty in Council shall have and enjoy in all respects such and the same powers of enforcing judgments, decrees, and orders, as are now exercised by the Court of Chancery or King's Bench, (and both in *personam* and in *rem*,) or as are given to any Court *Ecclesiastical*, by an act passed in 2 & 3 W. 4, c. 93, (*p*) intituled an act for enforcing the process upon contempts in the Courts Ecclesiastical of England and Wales; and that all such powers as are given to Courts Ecclesiastical, if of *punishing contempts, or of compelling appearances*, shall be exercised by the said Judicial Committee; and if of enforcing *decrees and orders*, shall be exercised by his Majesty in Council, in the same manner as the powers in and by such act given, and shall be of as much force and effect as if the same had been expressly given to the said committee or to his Majesty in Council.

The 18th section authorizes his Majesty to appoint a *registrar* of the said Privy Council, as regards the purposes of that act, and to direct what duties shall be performed by such registrar.

The 29th section enacts that, subject to such orders as his Majesty in Council shall make, the then *present registrar* of the High Court of Admiralty, in person or by deputy, may attend the hearing by the said Judicial Committee of all causes and appeals, upon the hearing of which, if the act had not been passed, he would have had a right to attend by virtue of his offices of registrar of the High Courts of Admiralty, Delegates, and Appeals for Prizes.

The 31st section reserves the provisions in any treaty with any foreign potentate, in which it shall be stipulated that any person or persons other than the said Judicial Committee shall hear and finally adjudicate appeals from his Majesty's Courts of Admiralty in causes of prize.

By ORDERS IN COUNCIL of 9th December, 1833, (*q*) after *reciting* that it was expedient that certain rules and regulations should be made for the more convenient conducting of appeals and applications in *prize* suits, and in all *other suits* or proceedings in the said Courts of *Admiralty* or *Vice-Admiralty*, or

(*p*) Should have been noticed, *ante*, 485.

(*q*) See 2 Knapp's Rep. xx. to xxiv.

any other Court in the plantations in America, and other his Majesty's dominions elsewhere abroad, which might formerly have been made to the High Court of Admiralty in England, or to the Lords Commissioners in prize causes respectively, as well as of such appeals, suits, or complaints in the nature of appeals from or in respect of the determination, sentence, rule, or order of any judge or judicial officer of any Ecclesiastical Court in England, or of the said High Court of Admiralty in England, which, by virtue of any law, statute, or custom, shall be made to his Majesty in Council; therefore, first, orders that all of them shall be conducted in the same manner and by the same persons as formerly; secondly, it is then ordered that four or more of the Judicial Committee may appoint surrogates of the Prerogative and Admiralty Courts, to act as surrogates of the Judicial Committee; thirdly, it is then ordered that the then present registrar of the Court of Admiralty shall attend on all appeals which would formerly have been heard by the Court of Delegates and Admiralty or Commissioners of Prize Appeals; and fourthly, that on entering an appeal in the Court of Admiralty and Appeals a petition shall be presented to the King in Council, which shall be transmitted to the registrar.

CHAP. V.
SECT. XIV.

2. JUDICIAL
COMMITTEE OF
PRIVY COUN-
CIL.

The order in council of 10th December, 1833, recites, the third of the last mentioned order in council, and then declares, that in pursuance of that authority, the several advocates of the Arches Court of Canterbury, and of the said High Court of Admiralty, who now are or hereafter shall be duly or legally admitted surrogates of such Courts, may by four or more members of the said Judicial Committee be admitted surrogates thereof for and in respect of such appeals, applications, suits or complaints in the nature of appeals as aforesaid, and for the purposes mentioned in the said order.

Order in
Council, 10
Dec. 1833.(r)

In a preceding page we have seen that the Chancellor, the Master of the Rolls, and the Vice-Chancellor have a right to send a case, stating facts, and a question of *law* thereupon, to a Court of *Law* for their opinions upon a point of law, though not upon a matter of trust, or an equitable question, or a mere abstract question, without the particular facts upon which the question has arisen. (s) But before the late act, it was decided that the Privy Council has no right to send a case to a Court of Law for its decision; (t) and constituted, as we have seen the

Other matters
relating to the
Privy Council
and the Judi-
cial Committee.

(r) See 2 Knapp's Rep. xlv.

(s) *Ante*, 350 to 352.

(t) 1 Hen. Bla. 673; Douglas, 330,

where the Court of King's Bench refused to receive or answer a case from the Privy Council; and see 2 Knapp's R. ix. in note.

CHAP. V.
SECT. XIV.2. JUDICIAL
COMMITTEE OF
PRIVY COUN-
CIL.

Judicial Committee of the Privy Council now is under that act, of at least the Chief Justices of the King's Bench and Common Pleas, and Chief Baron of the Exchequer, there is less reason for requiring the advice or opinion of the judges of a common law court. (t)

In a recent case before this act, it appears to have been considered in the Privy Council that that Court will not exercise jurisdiction as a Court of Appeal from the decision of the Lords Commissioners of the Treasury, as to grants by the crown of property accruing to it by virtue of its prerogative; (u) but the 4th section of 3 & 4 W. 4, c. 41, appears now to enable his Majesty to refer to the Judicial Committee any such matters whatever as he shall think fit, and appears also to extend to such a case, so that his Majesty might require the Judicial Committee to consider and report to him their view of the course that should be adopted. (x) Upon a writ of error from the British West Indies, if it appear that the judge of the original Court inconsiderately signed an imperfect and incorrect bill of exceptions, a Court of Error in the same country ought to direct the bill of exceptions to be taken off the file and amended by the judge's notes, and the Privy Council here will direct that to be done. (y)

From the island of Guernsey, several of the inhabitants there may proceed by petition for leave to appeal from a decision of a Court there, confirming a rate for the relief of the poor, although separately and collectively they were rated in less than the sum fixed by the orders in council regulating appeals from that island, and prohibiting appeals where the sum in dispute is under a certain sum; such a case of small rates not being within the intent of the orders in council regulating appeals. (z) When the Privy Council has sent a reference to a Court below for them to certify as to a point of practice, their certificates cannot be disputed, unless a petition praying for a fresh reference is presented and supported by affidavit disputing the accuracy of the certificate. (a)

The course of proceedings in the Judicial Committee of the Privy Council.

The course of proceedings in the Judicial Committee of the Privy Council varies according to the country and Court from

(t) And see *ante*, 452, note (p), as to the equity side of the Court of Exchequer not stating such a case, because its own equity judges are also judges on the law side of the Court.

(u) *Army of the Decan*, 2 Knapp, R. 103.

(x) The above case was decided on the

9th and 10th of July, 1833, and the act 3 & 4 W. 4, c. 41, was passed on the 14th of August, 1833.

(y) *Pownall v. Mascall*, 2 Knapp, R. 161.

(z) *In re Tupper*, 2 Knapp, R. 201.

(a) *Quesne v. Nicolle*, 1 Knapp, R. 257.

which the appeal has taken place. From the East Indies, from which of late the appeals brought to an hearing have been numerous, a perfect *transcript* of the pleadings and proceedings in the local provincial Courts and foreign Courts of Appeal, with the interrogatories and examinations and testimony of all the witnesses, and the whole of the evidence, and the interlocutory and final decrees of the foreign Courts, in natural order of time, is sent over from abroad and is produced before the Judicial Committee, and each member, anxious to become master of the whole proceedings, may examine the same. But to facilitate research and a more ready attainment of the knowledge of the merits of each case, *cases* are usually prepared, as well on behalf of the appellant as of the respondent, shortly analyzing the pleadings and proceedings, and referring to the full transcript, and then stating arguments and reasons on each side, and drawing conclusions in favour of the party on whose behalf the statement is made. Both these cases are printed at length, and in due time, before the hearing, printed copies are laid before the members of the Judicial Committee, and on the appointed day, one, two, or more counsel are heard on behalf of the appellant and respondent; and when the Judicial Committee, or the majority, have formed their opinion, the same is reported by the presiding law lord in open court to the King in Council, who thereupon ultimately decides. It seems that the decision of the Judicial Committee, or rather of the King in Council, upon the report and recommendation of such committee, is final and conclusive and that no appeal lies from thence to the House of Lords.

CHAP. V.
SECT. XIV.

2. JUDICIAL
COMMITTEE OF
PRIVY COUN-
CIL.

3. *The House of Lords.*

3. HOUSE OF
LORDS.

1. General observations on the jurisdiction of the House of Lords, especially on its appellate jurisdiction.
2. From what Courts and proceedings a writ of Error or appeal is or is not sustainable.
 1. From Courts in England.
 1. Of law.

2. Of equity.
 2. From Courts in Scotland.
 3. From Courts in Ireland.
 4. Not from Islands or other Foreign Courts.
3. The practice or course of proceedings on writs of Error and appeal.

Anciently and until within about a century, the House of Lords assumed and exercised *original* jurisdiction over civil suits and proceedings to a considerable extent, though it has been demonstrated that such assumption was unconstitutional. (b)

1. General observations on the jurisdiction of the House of Lords and especially its appellate jurisdiction.

(b) 3 Bla. Com. 57 ; Palmer's Practice. House of Lords, Introd. iv. v. xxvii. xxxii. and authorities there collected.

The latter work will be found historically interesting and instructive.

CHAP. V.
SECT. XIV.
3. HOUSE OF
LORDS.

With respect to *appellate jurisdiction*, although Lord Hale in his treatise on the jurisdiction of the Lords' denies it, yet his observations obviously merely present a learned conflict of authorities against long established practice, confirmed by numerous recitals and enactments. (c) Indeed it must be admitted to be of the utmost importance that *there should be a Supreme Court of Appeal*, by which the decisions of all inferior Courts in the kingdom may be reviewed and controlled; for without such a Court of appeal there would constantly be conflicting decisions on subjects exactly similar, but discussed and decided before different and independent tribunals, who would each in practice adhere to their own opinions on future occasions unless controlled by the highest Court of Appeal, whose decision, as settling the rule of law, would compel all inferior Courts afterwards to submit and conform. (d) The House of Lords is composed of the Lord Chancellor, certain law Lords, and the Lords Spiritual and Temporal. If, as advised by Sir Wm. Blackstone, *all the hereditary Lords of Parliament* (keeping in view the ultimate active exercise of their functions when by descent they would be required to sit in the House), would, in the course of their education, (in other respects in general admirably extensive,) study the general *principles* on which all the laws not only of *England* but of *Scotland* and *Ireland* are founded, in order to *qualify* themselves to exercise such their high judicial function, and if they would also, when members of that House, *laudably exert* sufficient *interest*, whether from due sense of duty or otherwise, *actually* to take part in the decisions of the House as a Court of Error and Appeal, then this august assembly would constitute the most efficient tribunal on earth; (e) because the House of Lords has not only the advantage of hearing the contending arguments of the most *eminent counsel*, excited by the occasion to the most acute and distinct examination of *each side* of the subject, but they also have and in difficult cases frequently exercise the privilege of convening before them all the *judges* and the highest law officers, and require each separately and *seriatim* to state his opinion upon all *legal* questions connected with the particular writ of error before the House. So that the spiritual

(c) See authorities, Palmer's Introd. xxxli.

(d) See a recent pamphlet attributed to Lord Redesdale.

(e) Sir Wm. Blackstone observes, that the reason and ground upon which the Lords are intrusted with their high appellate jurisdiction is, that the law reposes an entire confidence in the honour and conscience of the noble persons who compose

this important assembly, that (if possible) they will make themselves masters of those questions which they undertake to decide; and in all dubious cases refer themselves to the opinion of the judges, who are summoned by writ to advise them. See 3 Bla. Com. 57, 454, 455; 1 Bla. Com. 9, 10; and see Harrington's Observations on Statutes, 199; Palmer's Practice, Lords, Introd. xxxiii. 122 123.

and lay lords, before they are called upon to decide, may readily understand and appreciate all the possible reasons for or against a particular decision, and may thereupon exercise their own judgment, which, after their cultivated education and general attention to legal principles, they would then do with reasonable expectation of arriving at a just conclusion.

But unfortunately many, if not most, of the cases that are brought before the House of Lords are of a *technical* nature, and excite only the particular and private interests of the individuals concerned, and do not involve any great constitutional or legal principle; and therefore when they arrive at what is termed now almost ironically a "*hearing*," it too frequently happens that the House of Lords is actually reduced in number to its lowest limit of only *three Lords*; (*f*) and these are called upon to decide, not only on the legal merits of the unanimous decisions of the ten judges of the Court of Exchequer Chamber, but of the decrees of the Chancellor himself, and the decisions of all the judges of Scotland upon abstruse and difficult questions of their own local law, little known by English lawyers, and of the decisions of the judges in Ireland on their local law; and what is still more objectionable, it frequently occurs that the Lords who finally attend and *decide* upon the case, have not been present at or know half the arguments that have been urged pro and con. Such a tribunal is in practice obviously very inadequate and unsatisfactory, and indeed scarcely decorously conducted, and it is essential that *a new jurisdiction* should be constituted somewhat analogous to that of the Judicial Committee of the Privy Council, (*g*) but requiring the attendance of more than *four* of its members, who in that particular jurisdiction are declared competent to exercise its functions. (*h*) As it is probable, that some

(*f*) Palmer's Practice, Lords, Introd. xl.

(*g*) 3 & 4 W. 4, c. 41, ante, 573 to 577.

(*h*) *Id.* sect. 5, ante, 574, 5. On Monday, the 14th August, 1834, the Lord High Chancellor Brougham laid before the House of Lords a bill for instituting such a Court, and made the following observations. "The manner in which appeals were heard involved a very serious grievance, both as regarded the judicial character of their lordships' house, and the interests of the suitors. When the first hearing of an appeal came on, two noble lords sat and assisted at the opening; two others attended the hearing on the other side. On the third day two noble lords, who had not been present before, came down and heard the reply.

The cause was then set down for judgment, and in the fourth instance two noble lords assisted at that judgment who had not heard the beginning, the middle, nor the end of the proceeding. Such a system was not in accordance with common decency either to noble lords who were thus called in rotation to assist in appeal cases, to the suitors whose interests were to be considered, or to the house itself. The anomaly of appealing to the Chancellor in that house, with reference to causes which he had previously decided elsewhere, had so often been stated on various occasions that he need not go into great length on that point. He had now been sitting for the greatest part of this session on Irish and English appeals, and he had been obliged to postpone for two sessions several

CHAP. V.
SECT. XIV.Third,
HOUSE OF
LORDS.

material alteration will ere long be introduced in the constitution and course of proceedings in this Court of error and appeal,

of those causes, because they were appeals from his own judgment. He was anxious to obtain the assistance of Lord Plunkett or the Lord Chief Baron, but as he could not procure their valuable aid, he was compelled to hear those appeals himself. There were 14 or 15 appeals, in deciding which he wished to have that assistance, and of these, 10 or 11 were appeals from his own judgments. Now, he had not the least degree of bias in favour of any judgment that might have been given by himself, and if proper cause were shown, he would be ready to alter it. His affirming a judgment of his own in that house did not make the point right, if the decision were originally wrong. Professional men would see, and would mark the error. But what he looked to was this—that by affirming a judgment he gave it the force of law, and nothing but an act of Parliament could alter it. That being the case, he would ask whether it was proper that an appeal should lie to any one single judge? Whether, for the purpose of insuring a right decision, of commanding confidence in that decision, with reference to the suitor, the public, and the profession at large, and of obtaining uniformity in decision—whether, for the attainment of these great purposes, it was not absolutely necessary that a court of appeal, consisting of more persons than one, should be established? The law assumed that such a Court did exist. But because it made all their lordships hereditary judges of appeal, *in common law cases they called in the judges; but in appeal cases, English, Scotch, and Irish, this was not the practice.* The defect of the system might be proved by a single instance. *Suppose a decision of the 13 judges of Scotland appealed against. It was taken from those persons, who understood the Scotch law, and was to be adjudicated by a single individual, who perhaps was as ignorant of the law of Scotland as of the law of Japan.* Was it likely that his unassisted decision could give satisfaction? There was much truth in the homely proverb “Many heads are better than one.” This was clearly borne out by the entire success of the Judicial Committee of the Privy Council. The second case tried before them would have been decided the other way, if any one of those who formed the committee had considered it alone. But the judges laid their five heads together, and the consequence was a unanimous judgment directly contrary to that which any one of them unassisted would have pronounced. These were his reasons for desiring some modification of the existing law. He would now allude to the difficulties which he had to overcome in effecting any such modifications. The

first was the repugnance which he had naturally felt to alter the jurisdiction of their lordships, and the next was the small number of judges from whom he could select a certain number to hear appeals; for he held it to be indispensable that appeals should be decided by judges taken from other Courts, and not by judges appointed for the express purpose of deciding such cases, and forming a separate and exclusive tribunal. The example of France, where there were two Courts exclusively for hearing of appeals—namely, the Cour Royal and the Cour de Cassation—proved nothing, for there was such a vast number of inferior judges, that it would be almost impossible to call upon them to sit in appeal. He thought that judges who were only judges of appeal would not be fit for anything. What would he (the Lord Chancellor) be worth as a judge, if he sat forty or fifty days in the year to hear appeals only, without being accustomed to the forensic *strepitus*, as it were, and without having heard the business done in the first instance, which afterwards became the subject of appeal? There never would be a Court of Appeal worth any thing, unless the judges composing it sat also in the Courts below. On the other hand, it was necessary that the judges of the Court of Appeal should not be those whose decision was appealed against; and on the other, that they should be accustomed to preside in the Courts below. There was but one middle course to take, and that was judiciously to compose a due admixture of the various judges with those whose decisions were appealed against,—thus proceeding on the principle of analogy to the Courts of Common Law. When the Court of King's Bench, or the Court of Exchequer, or the Court of Common Pleas went wrong, an appeal was made to the other common law judges, and so when all these judges went wrong, an appeal took place to the House of Lords, which sent for the judges, who intermixed with the equity judges, and applied their minds to the subject. It was upon this principle that the Judicial Committee of the Privy Council was constructed, and upon the same principle he would proceed to the change he was about to propose; and as in the former case the royal prerogative was left untouched, so in the latter the jurisdiction of the House of Lords would remain unimpaired. The Judicial Committee of the Privy Council consisted of judges selected by rotation, of whom there were never less than four present. They decided the appeal, and reported their decision to the Privy Council, where judgment was given by the King

we will here introduce only a few observations that will probably continue to be applicable notwithstanding such alterations.

CHAP. V.
SECT. XIV.

Third,
HOUSE OF
LORDS.

2. From what Courts and proceedings, and in what order the House of Lords exercises an appellate jurisdiction in general.

The House of Lords has not, strictly speaking, any *original* jurisdiction over *civil* disputes or causes, and, therefore, no original suit can be *commenced* before this tribunal.⁽ⁱ⁾ But the *appellate* jurisdiction of the House as well from the decision of superior Courts of *Law* (exercised by writ of error) as from the decrees and decisions of superior Courts of *Equity*, (exercised by petition and appeal,) is very extensive, (though confined to decisions within England, Wales, Scotland, and Ireland,)^(k) and may be considered, as it affects judgments, decrees, decisions, and proceedings, first, in *England*; secondly, in *Scotland*; thirdly, in *Ireland*; and fourthly, in *other* cases. But, first, it is necessary to advert to the *common law rule*, that if there be a fixed ascending scale of superiority affecting several Courts, an error in the judgment of the inferior Court must, in general, be examined and determined in the Court *next in order* in such ascending scale, and will not lie *per saltum*, as it is termed, to the highest tribunal; thus at common law, on a judgment of the Common Pleas, a writ of error did not lie directly to parliament, but to the King's Bench;^(l) and although we

in Council precisely as before. This, he repeated, was the principle upon which his bill proceeded. It would give their lordships the power of calling for the services of the judges in equity, and of directing any case in which an appeal might be resorted to to be tried by a Judicial Committee to be appointed under the bill. This Judicial Committee would pronounce its judgment in open Court, which would be reported to the house, and then the house would pronounce its judgment in open Court. The rights and dignity of their lordships' house would be preserved inviolate as heretofore. He proposed that the Judicial Committee should always have presiding over it either the Lord Chancellor for the time being, or the Chief Justice of the King's Bench; or a new officer, a Vice-President, without salary, to be appointed by the crown, and to hold rank next to the Privy Seal, and who must previously have filled the office of Lord Chancellor, or Lord Chief Justice of the King's Bench, or of the Common Pleas. The Vice-President, however, would only be called upon to act when the Lord Chancellor or the Chief Justice of the King's Bench might be prevented from presiding in consequence of being engaged elsewhere. Thus, then, the Judicial Committee of the House of Lords would consist of four judges,

who would be presided over by the actual or late Lord Chancellor, or the actual or late Chief Justice of the King's Bench, or of the Common Pleas. He wished it to be observed that no part of their lordships' jurisdiction would be taken away by the change which he proposed. Other suggestions and observations on the improvement of this tribunal will be found in Palmer's Prac. Lords, Introd. xlii.

(i) 3 Bla. Com. 57; Palmer's Prac. Lords, Introd. iv. v. xxvii. xxxii. A bill for a divorce from the bond of marriage, and so as to enable the parties to marry again, not being an *action* or *suit*, but a proceeding of a different nature, cannot be deemed an exception to such rule. There are certain orders and established practice in the House of Lords respecting bills for divorce, the principal of which are, that to sustain such a suit there must have been, first, a decree of divorce a mensa et thoro in the Spiritual Court; and secondly, a verdict or judgment by default, and the quantum of damages settled in an action in one of the superior Courts, and certain other rules of the House prescribed to prevent collusion. See *ante*, vol. i. 60, 61; 1 Newl. Chan. Pr. 370.

(k) 3 Bla. Com. 57.

(l) Hale's Juris. 123.

CHAP. V.
SECT. XIV.Third,
HOUSE OF
LORDS.

have seen that this is now altered in one respect, and the writ of error from the judgment of Common Pleas, in an action commenced in that Court, must be returnable directly in the Exchequer Chamber, and not in King's Bench; yet it cannot be returnable immediately in the House of Lords.^(m) And in the case of Lord *Macclesfield*, who brought a writ of error from a judgment of the Court of Exchequer of Pleas returnable in Parliament, it was effectually objected that it came there *per saltum*, and ought to have gone first to the Exchequer Chamber, under the 31 Edw. 3;⁽ⁿ⁾ and although it is another maxim that the *multiplication of appeals* is not to be favoured,^(o) and the 1 W. 4, c. 70, s. 8, was probably in part enacted on that principle, yet (with the exception of the proceeding in a superior Ecclesiastical Court in the first instance by letters of request, and thereby ousting intermediate Courts of their jurisdiction,) that is an anomaly unknown in the common law, and to be established only by special enactment.

Another general rule is also here to be noticed, viz. that when there is a succession of Courts of Error, and it is known that one of the parties is resolved at all events to carry his case ultimately to the highest tribunal, yet it is considered to be incumbent on each inferior Court fully to discuss, and duly to deliberate before they give judgment, and not to decide hastily as of course *pro formâ*, which a late Lord Chancellor treated as highly condemnable and improper.^(p)

1. From what
Courts and pro-
ceedings in
England.

Error from
Courts of law.
(q)

We will now proceed to consider more particularly from what Courts and proceedings a writ of error or appeal is or not sustainable, and *first*, as regards *England*, and herein, 1. as respects *Courts of Law*. We have seen, when considering the jurisdiction of the *Exchequer Chamber*, that writs of error to impeach the judgment of that Court must, by the express terms of the 1 W. 4, c. 70, s. 8, be returnable in the House of Lords, the enactment being, "from which judgment in error no writ of error shall lie or be had, except the same be made returnable in the High Court of Parliament."^(r) But notwithstanding this act unquestionably extends to all judgments in error of the Court of Exchequer Chamber, yet there are still cases in which a writ of error lies *directly* from the King's Bench into the House of Lords, without the intervention of a

(m) *Ante*, 568, 569; 1 W. 4, c. 70, s. 8.

(n) 1 *Ld. Raym.* 15; *Skin. R.* 517; *Palmer's Pr. Lords*, 121, 127; 3 *Bla. Com.* 410.

(o) *Ante*, 497; 3 *Phil. R.* 255.

(p) *Per Lord Eldon*, Chancellor, in

House of Lords, pending discussions in *The King v. Woolf*, MS.

(q) See in general from what proceeding a writ of error returnable in Parliament lies, *Palmer's Pr. Lords*, 134 to 151.

(r) *Ante*, 568.

judgment in the Exchequer Chamber. Thus where there has been a judgment in King's Bench upon a writ of error from an *inferior Court of Record*, then a writ of error is still returnable directly into the House of Lords, because the 1 W. 4, c. 70, s. 8, only applies to judgments of the Courts of King's Bench, Common Pleas, and Exchequer, in actions which were *originally commenced* in one of those Courts, and to which the writ of error is directed, (s) although on *principle* there seems to be no reason why in the constitution of Courts of Error the propriety of all judgments whatsoever should not be inquired into and determined in the Exchequer Chamber before the inquiry, should be transferred to the House of Lords. So notwithstanding the statute 1 W. 4, c. 70, s. 8, if a writ of *false judgment* from the decision of an inferior Court, not of record, be returnable in the Common Pleas, and by the decision there becomes matter of record, and then a writ of error upon the latter judgment be returnable, as it clearly may, in King's Bench, then after judgment there must be a writ of error upon such latter judgment, returnable in the House of Lords, without the intervening tribunal of the Exchequer Chamber. (t) So if a judgment of the *Cinque Ports* be affirmed or reversed in King's Bench, a writ of error thereupon lies in the House of Lords. (u) And upon a judgment of King's Bench on a writ of error from the Petty Bag, it has been supposed that a writ of error lies directly after judgment in King's Bench to the Lords. (v) At all events it seems that the legal propriety of the decision of the most inferior Courts of Law in England, whether of record or not, may ultimately be investigated *as matter of right* in this highest tribunal; subject nevertheless, as we shall presently see, to the necessity for finding *bail*, and some other qualifications introduced only by express enactments. But in general the 1 W. 4, c. 70, s. 8, will apply to all judgments of King's Bench, Common Pleas, or Exchequer of Pleas, given in an action *commenced there*, and require the writ of error to be directed first into the Exchequer Chamber, and from thence to the Lords.

It seems scarcely necessary to observe, that a writ of error can only be sustained on account of some *intrinsic* objection apparent on the face of the record, as either in the pleadings (x) or *continuances*, or the *judgment* itself, or in respect of objec-

(s) *Ricketts v. Lewis*, 2 Crompt. & J. 11.

(t) Rol. Ab. 744; Bac. Ab. Error: Palmer's Pr. Lords, 135; and see *Ricketts v. Lewis*, 2 Crompt. & J. 11.

(u) Palmer's Pr. Lords, 136.

(v) *Id.* 138.

(x) Palmer's Pr. Lords, 130; 3 Bla. Com. 378.

CHAP. V.
SECT. XIV.Third,
HOUSE OF
LORDS.

tions appearing upon a *demurrer to evidence*, *bill of exceptions*, or *special verdict*, either annexed to or directly forming part of the proceedings; and in order to succeed in the Court of Error, the objection must be of so *substantial* a nature as not to be aided either at common law or by any statute of amendment or jeofail. (y) The mistatement of the plaintiff's case, or of the ground of the defence in the *pleadings*, the misdirection of *the judge* on the trial, or the *mistaken verdict* of a jury, can in no case form the subject of objection or inquiry in a Court of Error, unless in the instances above pointed out. Nor can decisions of the superior Courts upon *special cases* be investigated in a Court of Error, because neither the *facts* therein stated, nor the decision of the Court as respects *them*, ever form part of the record or transcript, which is sent to the Court of Error; (z) unless in consequence of leave reserved for that purpose, the facts of the special case be turned, as is the technical expression, into a special verdict, for the very purpose of taking the opinion of a Court of Error upon their effect. It is also an established rule, that a writ of error is not sustainable from or in respect of a rule or order, or interlocutory proceeding of a Court, or of a single judge on a *motion* or *summons* or otherwise, or relating to the intermediate stages of proceedings in an action; (a) nor as regards the rules or practice of a Court, or granting or refusing leave to plead double, or granting a new trial; the observations of Chief Justice Tindal, before noticed, are a clear exposition of the law on this subject. (b)

So no writ of error is sustainable in respect of an award, even though made a rule of Court; nor in any case where by actual or supposed legal authority the Court has erroneously acted in a summary way; nor in cases of contempt; nor in settlement cases removed into the King's Bench from the sessions; nor from decisions under the Annuity Acts. (c) And although the Court of King's Bench, we have seen, may examine these and many other proceedings *summarily* or by *certiorari*, and decide upon the proceedings of the inferior tribunal thereby brought before them, yet in these cases, and in all those where an inferior Court, as the Court of Requests, has been empowered to proceed in a method different from that observed in Courts of common law, the propriety of their judgment or proceeding cannot be the subject of a writ of

(y) *Lyme Regis v. Henley*, 1 Bing. New Cas. 239.

(z) 3 Bla. Com. 378; Palmer's Pr. Lords, 130

(a) Palmer's Pr. Lords, 140.

(b) *Ante*, 574, 575, and *id.* n. (k).

(c) Palmer's Pr. Lords, 140.

error.(c) And in the superior Courts, when a *judgment is arrested*, there being no entry of a judgment, “*ideo consideratum est, &c.*” consequently no writ of error lies; but if the decision be incorrect, the plaintiff can only proceed *de novo*.(d) It is also established, that when a bill of exceptions is returned to a Court of Error, the counsel arguing in the latter Court is confined entirely to the matter expressly excepted to, and cannot argue upon other facts however apparent on the face of such bill.(e) Nor will the House of Lords receive from the agent of the plaintiff in error, a petition to refer to the judges the legal points in the case.(f) The observations as regards writs of error in the Exchequer Chamber, are in this respect equally applicable to a writ of error returnable in the House of Lords.

With respect to writs of error *in fact*, as upon the ground of the *infancy* or *coverture* of the defendant, or of *death* before verdict, it has been the general opinion that they are in no case sustainable either in the Exchequer Chamber or in the House of Lords.(g) But it seems questionable whether exceptions do not exist, so that such an objection might be advanced upon a writ of error, returnable in the House of Lords, (g) and tried by transmitting the proceeding as regards the fact to the last preceding Court that had jurisdiction to convene and try a fact by jury.(h)

So there are some Courts of *Law* in England, from which no writ of error lies, because another remedy has been afforded, as from the Court of the Stannaries of the Duchy of Cornwall, for matters touching the Stannaries, there being an appeal to the Warden of the Stannaries, and from him to the Privy Council of the Prince of Wales, as Duke of Cornwall; and if there be no Prince of Wales, then to the King in Council.(i)

Secondly, From Courts of Equity. In general, from Courts of *Equity* in England, instead of a writ of *error*, (which issues only to remove the proceedings and judgments of Courts of *Law*,) the mode of appeal is by *petition for leave to Appeal*, and

2. From Courts of Equity.

(c) 1 Salk. 144, 263. As in the instance of decisions in Courts of Request, whose judgment is not founded on formal pleadings.

(d) Palmer's Pr. Lords, 141, 142.

(e) *Lucas v. Nickolls*, cited in *Wright v. Tatham*, 1 Adol. & Ellis's R. 15; ante, 574, note 9, and 577, 578; and see *Frankland v. McGusty*, 1 Knapp's Rep. 274, S. P.; post, 602, n.(t).

(f) *Rickets v. Lewis*, 1 Bing. New Cases, 196.

(g) *Ante*, 570; and see 1 Archbold's

Pract. K. B. by T. Chitty, 330.

(h) Palmer's Pract. Lords, 142 to 144; 139, 149, 151, 152, 154, 158; Rol. Ab. 746; Comyn's Rep. 597; 3 Salk. 146. In Palmer's Prac. Lords, 144, Lord Hale's Juris. 152, 153, is referred to, and it seems clear that an issue in fact might be joined in the Lords, and the record thereupon remitted to the next subordinate Court having jurisdiction to award jury process and try a question of fact.

(i) 4 Inst. 230; 3 Bla. C. 77; Palmer's Pract. Lords, 141.

CHAP. V.
SECT. XIV.Third,
HOUSE OF
LORDS.

by *Appeal* thereupon to the House of Lords. (i) And the origin, necessity for, and history of which jurisdiction is concisely stated by Sir William Blackstone. (k) It is said that appeals to the House of Lords from the Court of Chancery were first introduced in A.D. 1581. (l) This is the mode of obtaining an investigation of the decrees and final proceedings of the Chancellor, Master of the Rolls, Vice-Chancellor, and equity side of the Court of Exchequer, and from all the Courts of *Equity* in England and Wales; (m) and Blackstone observes, that from decrees of the Chancellor, relating to the commissioners for the dissolution of chauntries, &c., under the 37 H. 8, c. 4, as well as for charitable uses, under the statute 43 Eliz. c. 4, an appeal to the King in Parliament was always unquestionably allowed. (n)

But no appeal lies to the House of Lords from an *order* of the Chancellor in matters of *idiotcy* or *lunacy*, there being, as we have seen, a distinction between the jurisdiction of the *Court of Chancery* and the power of the Chancellor, and in these cases the proper course is to appeal to the King in Council; (o) or, as we have seen, after the death of the lunatic a bill in Chancery must be filed. (p) And it should seem that from the decision of the Vice-Chancellor of Lancaster the appeal is to the Chancellor of the Duchy Court at Westminster. (q)

So before the recent Bankruptcy Act, 1 & 2 W. 4, c. 56, s. 37, (r) there was no appeal to the Lords from an order of the Chancellor in matters of *bankruptcy*; (s) but now an appeal to the Lords in certain cases is given. (t) But no appeal to the *Lords* is sustainable from the decision of an *Ecclesiastical* or *Maritime* or *Prize* Court in England, nor from any *Court Martial*, nor from the decision of *any foreign Court*, even of the British *islands* of Man, Jersey, Guernsey, Sark or Alderney, or from the *colonies*. All appeals from those islands and colonies must be to the Privy Council, and from a Court Martial to the King in person. (u) It should seem also that the proceeding appealed from to the Lords must have been a *final decree* or *decision*, or of that nature, and not merely an order or interlocutory proceeding. (v) And where a decree has been

(i) 3 Bla. Com. 454; Palmer's Prac. Lords, 2, &c.

(k) *Id. ib.* and p. 57.

(l) Palmer's Prac. Lords, 276, Introd. ii.

(m) Palmer's Prac. Lords; 3 Bla. Com. 104; 3 Bla. Com. 454; Smith's Procedure in House of Lords, i. 109.

(n) 3 Bla. Com. 455; Duke's Charitable Uses, 62.

(o) Lord's Journ. 14th Feb. 1726; 3

P. Wms. 108; 6 Brown's Cas. Parl. 329.

(p) *Ante*; Grosvenor v. Drar, 2 Knapp's Rep. 82.

(q) 5 Ves. 725; 1 Vern. 442; Palmer, 276.

(r) *Ante*, 550.

(s) Palmer's Prac. Lords, 2, 3.

(t) *Ante*, 550.

(u) Palmer's Prac. Lords, 3; 3 Bla. Com. 68; Erskine's Inst. 54.

(v) Palmer's Prac. Lords, 4, 5.

made, with consent of counsel, it has been considered that like a reference and award with such consent, it will be binding and cannot be appealed against; (x) and it has been doubted whether an appeal is sustainable merely in respect of an improper decree relating to *costs*. (y)

CHAP. V.
SECT. XIV.

Third,
HOUSE OF
LORDS.

Under the Act of Union, 6 Ann. c. 26, s. 12, writs of *Error* from judgments on the *law* side of the Court of Exchequer in Scotland may be issued returnable in the House of Lords in England, and may be obtained on a *certificate* of counsel that in his opinion there is real error, and thereupon obtaining the attorney-general's *fiat*. (z) And under the same Act of Union an *appeal* lies from the decision of any Court of *Equity* in Scotland. Appeals from judgments or decrees in *Scotland* have, by 48 G. 3, c. 151, been limited to judgments or decrees on the *whole merits*, except only with the leave of the division of the judges, pronouncing an *interlocutory* judgment or decree, or where there was a difference of opinion amongst the judges thereof, nor shall any appeal be allowed from interlocutors, or decrees of Lords Ordinary, which have not been reviewed by the judges sitting in the division to which such Lords Ordinary belong. The acts 53 G. 3, c. 42; 59 G. 3, c. 3; 4 G. 4, c. 85, also contain further regulations respecting appeals from Scotland to the House of Lords, the operation of which will be fully stated, when we examine the whole practice in error. (a) No appeal lies from the Exchequer in Scotland as a Court of Revenue. (b) It has been justly suggested that it would be desirable that some of the Scotch judges, or some distinguished personages who had presided in that character, formed part of the tribunal when the House of Lords hear appeals from Scotland; for it is scarcely necessary to observe that those who pronounce judgment on appeal from that country should be fully acquainted with its laws. (c)

2dly, From
Courts in Scot-
land.

Before the Union, writs of error and appeals from the Irish Courts to the English House of Lords were the subjects of con-

3dly, From
Courts in Ire-
land.

(x) Palmer's Prac. Lords, 3, where see conflicting cases.

(y) *Id.* 5, 6.; 1 Dow's Cas. Parl. 270.

(z) Palmer's Prac. Lords, 138, 242 to 247; Introduction, xliv. to lvi.

(a) See also Palmer's Prac. Lords, Introd. xliv. to lvi.

(b) Lord's Journal, vol. xxxix. 394; Palmer's Prac. Lords, 4.

(c) Palmer's Prac. Lords, Introd. xliii. After considerable practice and frequent explanations of the Scotch laws, I have found them less accessible, and less known or understood by Englishmen, even lawyers, than even the French Code, and yet those laws highly deserve study, as replete with sound principle.

CHAP. V.
SECT. XIV.Third,
HOUSE OF
LORDS.

siderable discussion and hostility. The statute 6 G. 1, c. 5, took away the power of the Irish House of Lords as a Court of Appeal; but that enactment excited so much dissatisfaction, as derogatory to the Irish independence, that it was found necessary to repeal that act by 23 G. 3, c. 28, which took away the power of appeal from any Irish Court to the English House of Lords. (*d*) But at length the Act of Union, 39 & 40 G. 3, c. 67, article 8, (like the Scotch Union Act,) expressly directs that writs of *error* and *appeals* shall be finally decided by the House of Lords of the United Kingdom, except appeals from the *Instance* Court of Admiralty in Ireland, which were directed to be decided by the Delegates; (*e*) and are now to be discussed and reported by the Judicial Committee of the Privy Council to the King in Council. It is clear therefore that from the decisions of the twelve judges in Ireland, as a Court of Law, a writ of error is returnable in the House of Lords. (*f*)

4thly, In other cases; and whether from any other Court out of England.

It seems to be settled that from the judgment or decision of no Court out of the United Kingdom can a *writ of error* or petition or appeal in parliament be *returnable*, but that if there be any remedy, it is in the *Privy Council*, and be now discussed before the Judicial Committee. Thus from the Courts of the islands of Man, Guernsey, Jersey, Sark and Alderney, or in the colonies or settlements in America, Asia or Africa, or from the Courts in the East or West Indies, or from decisions in maritime or prize causes, no writ of error or appeal lies to the House of Lords; (*g*) but the proceeding for redress can only be by appeal to the King in Council. And though it is said that the acts of assembly, establishing Courts of Law in the islands of St. Christopher and Nevis, reserve the jurisdiction of the King's Bench in England; (*h*) yet there is no instance of the exercise of any appellate jurisdiction either by the Court of King's Bench or the House of Lords.

3dly, The course of proceedings in error, or on appeal in the House of Lords in general.

The Course of Proceeding. The mode of obtaining the interposition of this Supreme Court is by *writ of error* from a Court of *Common Law*, and by *petition* in the nature of an *appeal* from a Court of Equity. The principal differences between the two proceedings are, first, that a writ of error can only be brought upon a final and definitive judgment, whereas an appeal may be brought from an interlocutory order as well

(*d*) Palmer's Prac. Lords, lvi. to lviii.

(*e*) *Id.* 247, 351.

(*f*) *Id.* 138.

(*g*) *Id.* 3, 141, Introd. ii.

(*h*) *Id.* *ib.*

as from a final decree or sentence. The reason for allowing which appeals from intermediate orders in equity is stated to be that they often decide the merits of a case, and that the permitting of an appeal, in an early stage of the proceedings, frequently saves the expense, which is often very considerable, of prosecuting a suit further. (i) Secondly, on writs of error the Lords uniformly pronounce the judgment; and the same practice now prevails as regards appeals; (k) though formerly, it is said, they gave directions to the Court below to rectify, and in what respect its own decisions. (l) It has been observed, that owing to various causes, but chiefly to the acts of Union taking away appeals to the Scotch and Irish House of Lords, the number of *appeals* to the Lords has greatly increased, so as to exceed by far the *writs of error*.

A writ of error is a writ in the nature of a commission, and which issues out of Chancery, at the instance of a party who thinks himself aggrieved by an erroneous judgment of a *Court of Law and of Record*, authorizing a superior Court to examine the proceedings, and thereupon to affirm or reverse the judgment *according to law*. (m) The statute 10 & 11 W. 3, c. 4, requires the writ to be issued within twenty years after judgment signed or entered of record. (n) A writ of error in *civil cases* is a writ of right, though restrained by the regulations requiring bail, so as ultimately to secure the satisfaction of the sum recovered, with the costs in error. As the subject has a right to issue it without any other qualification than such bail and limit as to time, there is not, (as in the case of *appeals* from decrees of a Court of *Equity*,) any occasion for the *bonâ fide* opinion of counsel that there is ground of error, and it is only in criminal cases that the attorney-general's *fiat* is required, and though there is a warrant for the writ of error from the crown, it is quite of course. (o) The writ having been obtained is taken to the proper officer, whose duty it is to allow it, of which he gives a certificate, and to prepare a transcript of the whole record and proceedings for the Lords. The 6 G. 4, c. 96, in almost all cases of writs of error upon judgments, whether after verdict, or by default or otherwise, in any *personal* action, requires *bail* to enter into a *recognizance*, in sub-

Course of proceedings on a writ of error in civil cases.

(i) Palmer, Prac. Lords, 1.

(k) Palmer's Prac. Lords, 276; but see *ibid* p. 1.

(l) 3 Bla. Com. 56, 57, 454.

(m) Stra. 607.

(n) Palmer's Prac. Lords, 147. The

statute must be *pleaded*, R. T. Hardw. 345. Only five years are allowed for appeal. Palmer's Prac. Lords, Introd. lxviii.

(o) Palmer, 180.

CHAP. V.
SECT. XIV.Third,
HOUSE OF
LORDS.

stance resembling that required by 3 Jac. 1, c. 8, viz. in double the sum adjudged to be recovered, conditioned to prosecute the writ of error with effect, and to satisfy and pay, if the judgment be affirmed, the debt, damages and costs thereby adjudged to be paid, and also all costs and damages to be also awarded for the delay of execution. (p) The subsequent practice and proceedings in error will hereafter be fully stated, and we shall here merely notice a few points which are most important.

The standing order of 19th April, 1698, appears to apply to writs of error as well as appeals, and directs that no person do presume to deliver any printed case to any Lord of the House, unless the same be signed by one or more counsel who attended at the hearing of the cause in the Court below, or shall be of counsel at the hearing in this house, (q) and the printed cases are to be delivered to the clerk in parliament, ready to be distributed at least four days before the hearing. (r) The order of 2d March, 1727, regulates the proceedings on the hearing of a writ of error or appeal, and directs that one of the counsel of the appellant shall open the case; then the evidence for the appellant shall be read, and then the other counsel for the appellant may observe on the evidence; this closes the appellant's case. Then one of the counsel for the respondent states his case, and the evidence is thereupon read, after which the other counsel for the respondent may make observations on such evidence. And one counsel only for the appellant is finally heard in reply. (s)

The Lords have a right to require the attendance in the House of the judges and high officers of the law. (t) They are generally summoned to attend the *hearing of writs of error*, though seldom on appeals, and they usually take some days to give their opinions. (u) But it is only in cases of real difficulty that the attendance of the judges is in practice required, for if they were constantly in attendance on hearing all the writs of error discussed in the House of Lords, the performance of their ordinary duties would be materially impeded. (x) The judges can, however, merely be required to state their opinions upon the *existing common law* or construction of a statute already enacted, and cannot be required to state their opinions upon an equitable question foreign to their department, (y) and still less can they be required to answer a speculative pro-

(p) It is observed that even the agent's costs of error in parliament frequently exceed 400*l.* Palmer's Prac. Lords, xliii.

(q) Palmer, 91.

(r) Order, 12 Jan. 1724.

(s) Palmer, 96.

(t) Palmer's Prac. Lords, Introd. vi.

(u) *Id.* p. 225.

(x) *Id.* 356, 357; Introd. xl. xlii.

(y) *Semble, ante*, 351; and see Bac. Ab. tit. Habeas Corpus, long note.

spective question; and recently the judges declined answering a question touching the operation of a proposed enactment which it had been suggested would interfere with the exclusive banking privileges of the Bank of England.^(z) When the judges are prepared, and at an appointed time, they together attend the House, and it seems to have been the proper practice that the Chancellor, or some other law lord next in rank and experience, should also attend to receive and hear such opinions, so as to be prepared more efficiently to state the result to the spiritual and temporal law lords present, who are not supposed to be so conversant with legal rules as law lords; and on a late occasion the non-attendance of any law lord was objected to as irregular and objectionable, and Lord Eldon referred to a case in which a Lord Chancellor, after hearing the opinions of the twelve judges on a particular point, satisfied their lordships that the judges were wrong, and that their opinions could not be acted upon.^(a) Sometimes on these occasions each judge separately states his opinion on each question, but when all the judges are unanimous, then one judge delivers the opinion of the whole. The opinion of the judge is not by any means binding on the House of Lords, any more than is the opinion of the Court of King's Bench on a case stated to them obligatory on the Chancellor;^(b) but the unanimous opinion of the judges will in general influence the result.^(c) Where, however, a statute has been erroneously construed by the ordinary Courts of Law, even in a long series of decisions, this is an instance in which peculiarly the House of Lords may decide according to the spirit of the enactment.^(d)

The Lords do not confine themselves to any certain rule respecting *costs*, but give large or small or no costs to the defendant in error, as they think fit, upon affirming a judgment in his favour. They usually give 100*l.*, and seldom more than 150*l.*, although on one occasion they gave 400*l.* costs upon an affirmance,^(e) and in another case 350*l.* costs, because there were a current of decisions on the point.^(f) In all cases, as there is no officer of the house to tax the costs, their Lordships themselves always fix the amount, giving a round sum.^(g)

^(z) *In matter of London and Westminster Bank*, 1 Bing. New Cases, 197. But see several questions stated to the judges respecting a bill before parliament, and answered by them in Bacon's Ab. tit. Habeas Corpus.

^(a) See Report of Lord Eldon's observations and proceeding thereon fully, Times newspaper, 21 June, A.D. 1834, House of Lords.

^(b) *Ante*, 351, 352, and *Reeve v. Long*,

1 Salk. 227; *Bishop of London v. Flytche*, Cunn. Law, Simony, 2 Bla. Com. 280.

^(c) Palmer's Prac. Lords, Introd. xl., 356, 357.

^(d) *Ibid.* 357.

^(e) The recognizance on an appeal is limited to that sum.

^(f) *Solarte v. Palmer*, 1 Bing. New Cases, 194.

^(g) Palmer's Prac. Lords, 169.

CHAP. V.
SECT. XIV.Third,
HOUSE OF
LORDS.

The practice.

In practice, to obtain a writ of error, returnable in Parliament, the attorney makes out on a slip of paper what is termed a *præcipe*, or instructions for the writ of error, which is taken to the cursitor's office, where the proper officer makes out the writ, and as of course grants a warrant from the crown. (g) The writ of error is then taken to the office of the clerk of the errors and *allowed* by him, and he grants a certificate of his allowance, which is served upon the attorney for the defendant in error, the original allowance being at the same time shown to him.

The obtaining of the allowance of the writ suspends execution and all other proceedings on behalf of the defendant in error, and such service of the certificate of allowance giving notice would subject the defendant in error and his attorney to a contempt, if he should afterwards attempt to proceed on the judgment. The next step is to put in bail, now required in almost every case; this must be done within four days from the delivery of the writ of error to the clerk of the errors, being the time when he should allow the same. To put in bail in error instructions are written for the clerk of the errors, stating the names, places of abode, and profession of the bail, and the named persons enter into a *recognizance* in error, in double the sum adjudged to be recovered by the former judgment, conditioned for the plaintiff in error prosecuting the writ of error with effect, and if judgment be affirmed, to satisfy and pay the damages and costs (or debt, damages and costs) recovered, together with such costs and damages as shall be awarded by occasion of the delay of execution, or else that the bail will do it for him. Notice of such bail having been put in should be immediately served on the attorney for the defendant in error, and unless the bail be excepted or objected to in twenty days after such notice, they are to stand allowed. If the bail be objected to, then a rule for better bail is obtained by the attorney of the defendant in error from the clerk of the errors, and a copy of such rule is to be served on the attorney for the plaintiff in error, and then usually the same bail justify, and if they satisfactorily swear to their sufficiency, they are allowed, and a note for their allowance is to be drawn up, and a copy served on the attorney for the defendant in error.

Thereupon a *rule for transcribing* the record is to be obtained by the attorney for the defendant in error from the office of the clerk of errors in Serjeants' Inn, and thereupon the proceedings in error take place as will hereafter be fully detailed.

An *Appeal* can only be from a *decision*, although it may be founded not only upon a *decree*, but upon an *order absolute*, in which respect appeals in equity differ as we have seen from proceedings at law, where there must have been a *final judgment*.^(h) If from a decree, then the decree itself must in all cases have been *signed* by the Chancellor,⁽ⁱ⁾ and although a cause has been heard before the Master of the Rolls or Vice-Chancellor, or Judges sitting for the Chancellor, yet the decree is considered as the Chancellor's and must be signed by him.^(k) From decrees of the Master of the Rolls or Vice-Chancellor, there may be an appeal either direct to the House of Lords or to the Chancellor, but it is not usual to appeal to the Lords in the first instance, unless the decree has been signed and enrolled, in which case the appeal may be directly to the Lords, and cannot then, it is said, be reheard before the Chancellor.^(l) Of late the Chancellor has frequently recommended an appeal direct from the decree of the Master of the Rolls or Vice-Chancellor to the Lords; and it seems that such direct appeal lies notwithstanding there has been a rehearing by the Master of the Rolls.^(m)

Petitions of *Appeal* are limited *in time*, and must be presented within *five years*, and a recognizance in 400*l.* is required for securing costs.⁽ⁿ⁾

As respects *parties*, it is a general rule that an appeal can only be brought by a party in the original suit, and that therefore a third person, who has not been such party below, will not be allowed to interfere by petition of appeal;^(o) but if it appear that such a person *ought* originally to have been made a party, the Lords will send the cause back for that purpose.^(p)

On appeal from decrees or proceedings in equity, whether of English, Scotch, or Irish Courts, the House of Lords does not, in practice, convene or obtain the assistance of the judges,^(q) because the judges of the Courts of Law do not assume to be practically acquainted with equitable doctrines or rules; as however the Chancellor, Master of the Rolls, or Vice-Chancellor

(h) 4 Brown's Parl. Cases, 367, 368. Palmer, 7; *ante*, 596, 597.

(i) 4 Brown's Parl. C. 198; Palmer, 7.

(k) 3 Bla. C. 453; Col. Cas. P. 238; Gill. His. Chan. 190; Palmer, 7, *ante*, 447, 448.

(l) Palmer, 7, 8; 3 Bla. C. 454.

(m) 8 Ves. 566; Palmer, 8.

(n) Palmer's Prac. Lords, lxviii, 12, 26; and see there standing order of Lords,

24th March, 1725.

(o) Palmer, 6. We have seen that intervention is a proceeding in general confined to the Ecclesiastical Courts, *ante*, 492, 493.

(p) Holle's Cases in Parliament, 127; Palmer, 6, 7.

(q) Per Lord Chancellor Brougham, *ante*, 598, note (n).

CHAP. V.
SECT. XIV.Third,
HOUSE OF
LORDS.

may, on a case stated, obtain the opinion of the judges of a Court of Law, so as to enable them the better to decide upon matter of equity, it should seem that if it be expected that on hearing an appeal a difficult question of *law* will arise, then the House may require the attendance and opinion of the judges as regards that particular question.

Although on proceedings in the nature of appeal from an inferior Court, not of record, as from a conviction of justices of the peace to the sessions, or an appeal from a rate, fresh evidence is constantly received, and the facts are entirely re-investigated ; (r) it is otherwise on appeals from the decrees or decisions of Courts of Equity, whether in England or Scotland, in which case *no new evidence* is to be read or insisted upon. (s) And in Scotch appeals it is a rule of the House not to hear even *arguments* upon grounds not noticed in the Court below, (t) which practice is analogous to that of not hearing points arising upon the face of a bill of exceptions, unless they were formally raised and tendered to the judge on the trial. (u) But if the evidence has been rejected in the Court below, and such rejection there expressly objected to, then the same may be discussed in the Lords. (v)

Sir William Blackstone observes, that upon *appeals* to the House of Lords, their lordships gave directions to the Court below to rectify its own decree; but the present practice is otherwise: for the lords themselves reverse or vary erroneous decrees by their own order, and do not adopt the indelicate course attributed to them. It is true, however, that the lords may, and sometimes do, give directions to the inferior Court as to *future* proceedings. (x)

As to *costs*, the House of Lords has, it should seem, a discretionary jurisdiction, like that of a Court of Equity, so as not to be governed merely by the result, and very frequently much less than the actual costs are obtained, so as not too much to encourage appeals. (y) And when a judgment or decree is reversed, it is to be recollected that although the defendant in error may have been to blame in pressing for or relying upon the erroneous decision of the inferior tribunal, yet that *tribunal* principally occasioned the increased expense. It will be ob-

(r) *R. v. Commissioners of Excise*, 3 Maule & Sel. 138; *R. v. Jeffery*, 1 B. & C. 654; *ante*, this volume, 218.

(s) Palmer, 8; 3 Bla. C. 455; 1 Dow's Rep. 324.

(t) 1 Dow's Rep. 324; 2 Dow, 72; Palmer, 8.

(u) *Ante*, 593, n. (c).

(v) Palmer, 8.

(x) Palmer Prac. L. 276; but see *ibid.* page 1, referring to 3 Bla. Com. 56, 57, 454.

(y) Palmer, 171.

served that by the terms of the recognizance, presently noticed, it is limited to £400.

CHAP. V.
SECT. XIV.

Third.
HOUSE OF
LORDS.

The practice
on appeals.

The first step is a *notice* of appeal, (*s*) next a *petition* of appeal, constituting the appeal itself. (*a*) The order of the 3d March, 1697, requires the appeal to be signed by two counsel who have been counsel in the cause below, or shall attend as counsel at the bar of the House when the appeal is heard, and such counsel must certify that in their judgment there is reasonable cause of appeal, as thus, "We humbly certify that in our judgment there is reasonable cause of appeal in this case." (*b*) And in Scotch appeals the order of 1812 requires a peculiar form of certificate, stating either that leave was given by the Division Court pronouncing judgment to appeal, or that there was a difference of opinion among the judges of such division, pronouncing such interlocutory judgment. (*c*) It would be highly censurable if counsel should certify in favour of an appeal without due consideration, and bona fide entertaining the opinion that he subscribes; and on the 23d of March, 1715, a counsel was reprimanded on his knees by the House of Lords for disobeying the above mentioned order of the 3d of March, 1697, made to prevent the bringing of frivolous appeals. (*d*)

The appeal having been duly engrossed, is then taken to the parliament office, in order that it may be presented, but none of the proceedings in the Lords are upon stamped paper or parchment. (*e*)

The petition of appeal must be presented to the House by one of the lords. An order of summons to answer is then issued, and served upon the respondent, and afterwards an affidavit of same is made, and the appellant or his London agent, or other person, must, within eight days after his appeal has been lodged, enter into a recognizance in £400 conditioned for payment of such costs as this Court shall appoint, in case the decree appealed from shall be affirmed, and, as required by the standing orders of the 17th of July, 1710. (*f*) It has been justly objected, that improvidently there has not been any provision requiring the party entering into the recognizance

(*s*) See form, Palmer, 16.

(*a*) See form, Palmer, 17.

(*b*) Palmer, 16, 18.

(*c*) Palmer, 18.

(*d*) Palmer, Pr. Lords, 276. In Lords' Journal, 2d June, 1768, it appears that

an agent was taken into custody for putting a counsel's name to a case, Palmer, 53.

(*e*) Palmer, 24.

(*f*) Palmer, 22 to 27.

**CHAP. V.
SECT. XIV.****Third,
HOUSE OF
LORDS.**

to justify or shew that he is possessed of £400 after payment of his own debts; (g) and the practice seems even more defective in this respect than that of the Ecclesiastical Courts, in granting letters of administration, in which case we have seen that sureties may be required to justify, though not to state the particulars of their property. (h) This may suffice for an outline of the proceedings in this high Court of judicature; the full practice will be minutely stated in a distinct chapter closing this work.

(g) Palmer, 28.

(h) *Ante*, 502, 503.

INDEX

TO

FOURTH PART.

ACCIDENTS.

jurisdiction of Courts of equity in cases of, 408.

ACCOUNTS.

jurisdiction of Chancery over, 410.

ACTIONS.

injunction to prevent, 414.

ADJUDICATION OF BANKRUPTCY, 561.

ADMINISTRATION, LETTERS OF. See "*Prerogative Court.*"

proceedings to obtain, 500.

form of, 501.

entering caveat to prevent grant of, 502.

form of, *id.*

obtaining inventory or declaration, *id.*

proceedings on caveat, 503.

administration bond, 502.

sureties to, 502.

compelling justification of, 503.

form of affidavit of justification, *id.*

observations respecting, 504.

assignment of administration bond, 505.

action thereon, *id.*

ADMINISTRATION BOND. See "*Administration.*"

ADMIRALTY, COURT OF.

jurisdiction of, 508, 510.

enactments respecting, 509.

appeal from, 512.

1. Jurisdiction in cases of torts, *id.*

1. Suit for a sea battery, *id.*

2. For collision of ships, 513.

3. For possession of ship, 516.

4. For restitution of goods, 517.

2. In cases of contracts, *id.*

1. Between part-owners of a ship, 517.

2. For mariners' wages, 520 to 526.

summary power of justices respecting, 526.

3. Suits for pilotage, *id.*

4. On bottomry bonds, *id.*

5. For salvage, 528.

6. Wreck, 531.

3. When no jurisdiction, 532.

not for *mortgages* of a ship, *id.*

or person claiming title, *id.*

4. Course of proceedings in, *id.*

1. Form of affidavit to lead a warrant of arrest, 533.

2. Warrant thereon to arrest ship for wages, *id.*

3. Summary petition or libel for wages, 534.

1. Certificate referred to in libel, *id.*

2. Like certificate, *id.*

ADMIRALTY, COURT OF—continued.

4. Allegation on behalf of owner in a cause of subtraction of wages, when crew mutinous, &c. 535.
 5. Same in a cause of subtraction of wages, *id.*
 6. Warrant to arrest ship, *id.*
 7. Warrant to arrest master for sea battery, *id.*
- right of registrar of, to attend Judicial Committee of the Privy Council, 582.

ADULTERY.

- punishable in Ecclesiastical Court, 477.
proceedings for divorce on account of, 461, 489.

AFFIDAVIT.

- form of, by sureties to administration, 503.
to lead warrant for arrest of ship, 533.

AGREEMENTS.

- jurisdiction of Courts of Equity, 422.
specific performance of, when decreed, *id.*

ALIMONY. See "Ecclesiastical Courts."

- when Court of Equity no jurisdiction over, 435.
suits for, in Ecclesiastical Court, 462.
costs pending suit for, *id.*

ANNUITIES.

- summary jurisdiction of King's Bench over, 329.
enactments respecting, *id.*
jurisdiction of Common Pleas over, 387.
Exchequer, Court of, not included, 393.
jurisdiction of Courts of Equity over, 431.

ANNUITY DEEDS.

- extensive jurisdiction of Courts of Equity to cancel, 331.

APPEAL, COURTS OF. See "Error, Courts of."

- jurisdiction of Courts of Law in cases of, 308, 312, 350.
are either summary or formal, 312, 350.
from inferior Courts, 350.
jurisdiction of King's Bench in appeal cases, 360.
is either formal, *id.*
or summary, *id.*
from Archdeacon's Court, 495.
Consistory Court, *id.*
Court of Peculiars, *id.*
Arches Court, 496.
jurisdiction of Arches Court in cases of, 498.
from Prerogative Court, 500.
from Admiralty Court, 502.
three principal Courts of, 567.
1. The Exchequer Chamber, 567, 568. See "*Exchequer Chamber.*"
2. The Judicial Committee of Privy Council, 567, 573. See "*Privy Council.*"
3. The House of Lords, 567, 585. See "*House of Lords.*"
practice on appeals to, 601.

ARCHDEACON'S COURT.

- jurisdiction of, 495.
appeal from, *id.*

ARCHES COURT.

- jurisdiction of, 496.
letters of request to, 497.
form of, 498.
jurisdiction as a Court of Appeal, *id.*
recovery of legacy in, *id.*

ARREAR OF WAGES.

- arrest of ship for, 533.

ARREST. See "Ship."

- of master of ship, 533.
of ship for arrear of wages, *id.*
forms respecting, *id.* See "*Forms.*"

ARTICLED CLERKS.

jurisdiction of Courts over, 338, 387, 394.

ARTICLES OF THE PEACE.

jurisdiction of King's Bench by exhibiting, 367.

ASSESSMENTS.

jurisdiction of King's Bench respecting, 380.
stating case by sessions, *id.*

ASSIGNEES.

appointment of, 547, 563.
choice of creditors, 565.
memorandum of choice of, 566.

ATTORNIES.

knowledge of jurisdiction of the Courts essential to, 302.
process against, and in which Court, 315.
jurisdiction of Courts over, 338, 387, 394.
admission of, to practise in Bankrupt Courts, 544.

AWARDS.

summary jurisdiction of Court of King's Bench over, 328.
recent enactments respecting, *id.*
jurisdiction of Common Pleas over, 387.
of Court of Chancery over, 431.

BAIL-BONDS.

summary jurisdiction of King's Bench over, 333.
of Common Pleas, 387.

BAILIFFS.

summary jurisdiction of King's Bench over, 337.

BANKRUPTCY, ACT OF.

when concerted, will not sustain fiat, 559.

BANKRUPTCY, COURT OF. See "*Review, Court of.*"

general observations respecting, 309, 540.
jurisdiction of, *id.*
the *substance* of former bankrupt law continues, 540.
though *practice* altered, *id.*
formal commission annulled, and *fiat* substituted, 541.
outline of former jurisdiction and practice, 541, 309.
present ameliorated jurisdiction, 541.
Court of Review, and subdivisions of, 542. See "*Review, Court of.*"
issuing London fiat, *id.*
country one, *id.*
analysis of 1 & 2 W. 4, c. 56..542 to 550.
summary of other enactments, 550.
substance of 2 & 3 W. 4, c. 114..551
rules and orders founded thereon, 551 to 555.
observations on the recent acts, 555.
proceedings to obtain and prosecute fiat, 556.
form of petitioning creditor's affidavit, *id.*
affidavit to obtain fiat, *id.*
petitioning creditor's bond, *id.*
of bond to obtain a country fiat, 557.
of petition for a fiat, 558.
same for country fiat and proceedings, *id.*
of town fiat, *id.*
the like, more concise, *id.*
for country bankruptcy, *id.*
the like, more concise, *id.*
decisions as to concerted fiat, 559.
consequences of deceptive description in, *id.*
proceedings after obtaining fiat, 560.
private meeting to open fiat, 561.
proceeding to adjudication, *id.*
preamble to proceedings, *id.*
memorial of commissioner being qualified, 562.
form of oath to witnesses, *id.*
deposition of petitioning creditors to the trading and act of bankruptcy, *id.*
form of adjudication, *id.*
warrant of seizure, *id.*

BANKRUPTCY, COURT OF—continued.

- appointment of the two public meetings, 563.
 - of official assignee, *id.*
- advertisement in Gazette, *id.*
- first public sitting, 564.
- memorandum of bankrupt having surrendered, *id.*
- proof of debt, *id.*
 - form of deposition of debt, 565.
 - form of affidavit on which to prove debt, *id.*
- choice of assignees, 565.
- memorandum of choice of assignees, 566.
- second public sitting, *id.*
- dividends, *id.*
- certificate, *id.*

BANNS.

- misnomer in publication of, marriage void, 488.

BASTARD CHILD.

- mother of, punishable in Ecclesiastical Court, 475, 476, 477.

BILLS OF EXCEPTIONS.

- how to be framed, 577, 578, 592.

BILLS IN EQUITY.

- to prevent actions by injunction, 414.
- of peace, 416.
- for relief against forfeitures, 417.
- to prevent setting up outstanding terms, *id.*
- or other legal defence, *id.*
- for discovery, 419.
- of interpleader, 417.
- for assignment of dower, 420.
- for partition, *id.*
- for contribution, *id.*
- to establish a modus, *id.*
- to marshal assets, 421.
- to compel lord of a manor to hold a court, *id.*
- for specific performance, 422.
- against trustees, executors, &c. 423, 424.
- when preferable on the equity side of Exchequer to Chancery, 452.

BLASPHEMY.

- punishable in Ecclesiastical Court, 478.

BOND.

- form of, to obtain a fiat, 557.
- administration bond and proceedings thereon, 502 to 505.

BOTTOMRY BONDS.

- suits in Admiralty Court for, 526.
- why the last bond usually preferred except as to seamen's wages, 527, 528.

BRAWLING.

- ecclesiastical jurisdiction over, 476.
- sentence, for, 477.

CASE.

- from Court of Equity for opinion of Court of Law, 350.
- right of Equity Courts to send one how qualified, *id.*
- Privy Council has no right to send for opinion, 583.

CAVEAT.

- entry of, in Prerogative Court to prevent grant of probate or letters of administration, 502.
- form of, 502.
- proceedings thereon, 503.

CERTIFICATE. See "*Seamen's Wages.*"

- of due service of mariner, 534.
- of bankrupt how obtained, 566.

CERTIORARI.

- jurisdiction of K. B. by writ of, 353.
- general utility of writ of, 353, 369.
- when it issues, 354, 369.
- when not, *id.*

CERTIORARI—continued.

- provisions of 5 W. & M. c. 11, respecting, 370.
- other enactments, 376.
- to remove convictions, orders, &c. 374.
- quere when remedy, if certiorari taken away, 376.
- practice, with respect to, 378.

CHANCELLOR. See "*Chancery, Court of.*"

- common law jurisdiction of, 405.
- his equitable jurisdiction, 407 to 425.
- his statutory jurisdiction, 425.
- specially delegated jurisdiction of, 426.
- summary of subjects of jurisdiction of, 439.
- how relieved from pressure of business, 441.

CHANCERY, COURT OF.

- I. Common law jurisdiction of, 308, 405, 406.
- II. Equitable jurisdiction of, 407.
 - is principally in cases of, *id.*
 - 1. Mistakes and accidents, 408, 409.
 - 2. Accounts, 410.
 - 3. Fraud, preventing or relieving against, 411 to 421.
 - 4. Infants, 421.
 - 5. Specific performance, 422.
 - 6. Trustees, legacies and executors, 423.
- III. Statutory jurisdiction of, 425.
- IV. Specially delegated jurisdiction of, 426.
- principal peculiarities in jurisdiction of, *id.*
- other peculiarities, 428.
- course of proceedings in, 429.
- are formal or summary, *id.*
- over annuity deeds, 431.
- arbitrations and awards, *id.*
- against solicitors, 432.
- when he has no jurisdiction, 433.
- not to prevent crimes, *id.*
- not over marriage or alimony, 434.
- except in certain cases, 435.
- when not over wills, *id.*
- not if remedy be at law, 436.
- unless equity jurisdiction concurrent, *id.*
- when concurrent, which preferable, 437.
- not when matter *infra dignitatem*, 439.
- summary of equitable jurisdiction of, *id.*
- Chancellor how relieved from pressure of business, 441.
- appeal from, is to House of Lords, 309.

CHASTITY.

- solicitation of, how effectually punished in Ecclesiastical Court, 478.

CHURCH RATES.

- jurisdiction of Ecclesiastical Court over, 472.
- proceedings for subtraction of, 491.
- form of citation, *id.*
 - of libel, *id.*

CHURCHWARDENS.

- jurisdiction of Ecclesiastical Courts over, 475.

CITATION.

- form of, in Ecclesiastical Court for verbal defamation, 486.
- for subtraction of tithes, 491.

CIVIL MATTERS.

- jurisdiction of Court of King's Bench over, 325.

CLAIM.

- when *infra dignitatem*, Court of Chancery will not interfere, 439.

CLERGYMAN.

- punishment for assaulting, 477.
- punishment of, for ecclesiastical misconduct, 475, 476.

COLLISION OF SHIPS. See "*Ships.*"

- jurisdiction of Court of Admiralty for, 513.
- suits for, 513, 535.
- preferable to action at law when, 514, 515.

COMMISSION.

to examine witnesses, 346, 421.
 enactments respecting, 346, 347.

COMMISSIONERS OF BANKRUPTS. See "*Bankruptcy, Court of.*"

appointment of, 542.
 the six London, form the two Subdivision Courts, 544.
 oath and proceedings of, 546.
 appeal from, to Court of Review, 549.

COMMISSION OF BANKRUPTCY.

formal commission now annulled and a fiat substituted, 541.

COMMON PLEAS, COURT OF.

constitution and jurisdiction of, 382.
 exclusive jurisdiction of, over
 real actions, 382.
 fines and recoveries, 383.
 all mixed actions excepting ejectment, *id.*
 exclusive privilege of the serjeants abolished, 385.
 court now thrown open, *id.*
 jurisdiction by habeas corpus, 386.
 over awards, 387.
 annuities, *id.*
 mortgagees and tenants, *id.*
 bail bonds and replevin bonds, *id.*
 attornies and officers of Court, *id.*
 removal of proceedings from inferior Courts, 388.
 has no jurisdiction to issue a mandamus, 389.
 jurisdiction in prohibition, 355, 385.
 not over crimes, 389.

CONJUGAL RIGHTS.

suits for restitution of, 460, 487.

CONSISTORY COURT.

jurisdiction of, 495.
 appeal from, *id.*

CONTEMPTS.

punishment for, before Privy Council, 579, 582.
 in not appearing, &c. after citation, 582.
 in Ecclesiastical Court, see 2 & 3 W. 4, c. 93, by mistake omitted in pages
 482, 484, 485

CONTRIBUTION.

bills for, between sureties, 303, 420.
 when preferable to proceed in equity than at law, 303, note (h).

CONTRACTS.

jurisdiction of Court of Admiralty over, 517, 582.

CONVICTIONS.

removal of, by certiorari, 374.

CORONER'S INQUESTS.

jurisdiction of King's Bench over, 374.

COSTS.

of election petition recoverable summarily, 340.
 in bankruptcy in discretion of Court of Review, 544.
 of appeal to Privy Council, 580.
 in House of Lords discretionary, 599.

COUNTRY FIAT, 541. See "*Fiat.*"**COURT OF REVIEW.** See "*Bankruptcy, Court of,*" "*Review, Court of.*"

jurisdiction of, 542.
 analysis of 1 & 2 W. 4, c. 56, respecting, 542 to 551.
 rules and orders of, 551 to 553.
 constituted a Court of Law and Equity and of Record, 543.

COURTS OF LAW. See "*Courts.*"

outline of jurisdiction of each Court, 311.
 is either formal or summary, 312.
 or by appeal, *id.*
 or error, *id.*
 controul over inferior Courts, 314.
 summary proceedings in, when sustainable, 312 to 314.
 jurisdiction of, in what respects co-extensive, 314.

COURTS OF LAW—continued.

- exceptions thereto, 314, 315.
- officers of, rules respecting, 315.
- alteration and extension of jurisdiction of, 319, 346.
 - recent enactments respecting, *id.*
- option to sue in, how influenced, 320 to 324.
- cannot compel a discovery, 348.
- how far aids the jurisdiction of other Courts, 350.
 - or compels them to act, *id.*
 - or restrains them from acting, *id.*

COURTS. See "*Jurisdiction.*"**I. Jurisdiction of the superior Courts in general, 301, 310.**

- division of and utility thereof, 302.
- necessity for knowledge of practice of each, *id.*
- judicious choice of, important, 302, 320 to 324.
- reasons for divisions of, 304.
- appropriation of business to each, *id.*
- attempts of, formerly, to extend jurisdiction, 307.
- consequences of wrongfully assuming it, *id.*
- enumeration of superior Courts in general, 308.
- of Courts of Law, *id.*
 - 1. The King's Bench, *id.* See "*King's Bench.*"
 - 2. The Common Pleas, *id.* See "*Common Pleas.*"
 - 3. Exchequer, *id.* See "*Exchequer.*"
- of Courts of Equity, *id.* See "*Equity,*" "*Chancery.*"
- of Ecclesiastical or Spiritual, *id.* See "*Ecclesiastical Court.*"
- of Court of Admiralty, 508.
- of Court of Prize, 538.
- of Court of Bankruptcy, 540.
- of Courts of Error and Appeal, 308, 568. See "*Error.*"
 - enactment of 1 W. 4, c. 70, s. 8, respecting, 308.
 - of Exchequer Chamber, *id.* 568.
 - of Judicial Committee of Privy Council, 573.
 - of House of Lords, 585.

principal distinction between jurisdiction of each Court, 310.

II. Jurisdiction and practice of Courts of Law, 311.

- outline of the jurisdiction of each Court, *id.*
 - whether formal or summary, 312.
 - by way of appeal or error, *id.*
 - by controlling inferior Courts, 312, 350.
 - or in aid of, 350.
 - summary proceeding, when sustainable, 312.
- co-extensive jurisdiction of each Court, 314.
 - exceptions thereto, 314, 315.
 - as to officers and attornies, 315.
 - revenue officers, 316.
 - officers of Courts of Equity, 317.
 - when debt or damages small, 318.
- alterations and extension of jurisdiction of, 319.
 - recent enactments respecting, 319.
 - selection of particular Court, how influenced, 320 to 324.

III. Jurisdiction of the Court of King's Bench, 324. See "*King's Bench.*"**IV. Of the Common Pleas, 382.** See "*Common Pleas.*"**V. Of the Exchequer of Pleas, 389.** See "*Exchequer.*"**VI. Of the Court of Chancery and Chancellor, 405.** See "*Chancery.*"**VII. Of the Master of the Rolls, 443.** See "*Master of the Rolls.*"**VIII. Of the Vice-Chancellor, 446.** See "*Vice-Chancellor.*"**IX. Of the Equity side of Exchequer, 450.** See "*Exchequer.*"**X. Of the Ecclesiastical Courts, 454.** See "*Ecclesiastical Courts.*"**XI. Of the Court of Admiralty, 508.** See "*Admiralty.*"**XII. Of the Prize Court, 538.** See "*Prize Court.*"**XIII. Of the Courts of Bankruptcy, 540.** See "*Bankruptcy.*"**XIV. Of the Courts of Error and Appeal, 567.** See "*Error,*" "*Appeal.*"**CRIMES.**

- Court of Common Pleas has no jurisdiction over, 389.
- nor has the Exchequer, 403.
- except collaterally, *id.*
- Court of Chancery exercises no jurisdiction even to prevent, 433.

CRIMINAL CASES.

- jurisdiction of King's Bench over, 361 to 367.

CRIMINAL CASES—continued.

Common Pleas has no jurisdiction over, 389.
 nor has the Exchequer, 403.
 except collaterally, *id.*
 Court of Chancery no jurisdiction, 433.

CRIMINAL INFORMATION.

jurisdiction of King's Bench by, 363.

CROWN PROPERTY.

equity side of Exchequer has exclusive jurisdiction in cases relating to, 453.

CRUELTY.

divorce on account of, 489, 461.
 proceedings for, 489.

CUSTOMS.

jurisdiction of Exchequer over, 401.

DEBT.

when no remedy in superior Court, 318.
 when small, Courts of Equity refuse to interfere, 439.
 proof of, to obtain fiat, 555, 564.
 forms of affidavit, 556. See "*Forms.*"
 of proof of, 565. See "*Forms.*"

DECREES.

of privy council, enrolment of, 581.
 how enforced, *id.*

DEFAMATION.

suits for, in Ecclesiastical Courts, when verbal only and imputing spiritual offence,
 467 to 472.
 form of citation, 486.
 of libel, 487.

DEFAMATORY WORDS.

proceedings in suit for, in Ecclesiastical Courts, 486.
 form of citation for, *id.*
 of libel for, 487.

DIOCESAN COURT, 495.

jurisdiction of, *id.*
 appeal from, *id.*
 recovery of legacies in, 498.

DISCOVERY.

Courts of Law cannot *compel*, 348.
 except on summary proceedings, 349.
 Court of Equity may, 348, 349, 419.

DIVIDENDS.

when to be made, 566.

DIVORCE. See "Ecclesiastical Courts."

suits for, on account of cruelty or adultery, 461, 489.
 costs of, pending suit for, paid by husband, 462.
 letters of request for instituting suit for in Arches Court, 498.

DOCUMENTS.

production of, before privy council, how enforced, 578, 582.

DOWER.

bills for assignment of, 420.

DRUNKENNESS.

punishable in Ecclesiastical Court, 477.

ECCLESIASTICAL COURTS.

general observations respecting, 454.

I. Subjects of Ecclesiastical Jurisdiction, 308, 455.

First, When they *have* jurisdiction, 455.

I. Over private injuries, *id.*

jurisdiction is local as to person, 456; and see 2 & 3 W. 4, c. 93,
 should have been in pages 482, 484, 485

1. Causes, pecuniary, 456.

for tithes, 456, 490, 491.

ecclesiastical dues, 457.

spoliation, or ecclesiastical waste, *id.*

2. Matrimonial causes, 458.

ECCLESIASTICAL COURTS—continued.

- jactitation of marriage, 459.
- nullity of marriage, 459—488.
- restitution of conjugal rights, 460—487.
- divorces for cruelty or adultery, 461.
- alimony, 462.
- costs pending suits, *id.*
- 3. Testamentary causes, 464.
 - legacies, 466, 498,
- 4. Defamation, 467 to 472, 486.
- 5. Disturbance of pews, 472.
- II. Over *public* matters and offences, 472.
 - 1. Church rates, 472, 491.
 - 2. Grammar schools, 475.
 - 3. Ecclesiastical officers, *id.*
 - 1. Churchwardens, *id.*
 - 2. Ministers, &c. *id.*
 - 4. Ecclesiastical offences, *id.*
 - brawling, &c. 476.
 - solicitation of chastity, *id.*
 - 5. Limitation of suits in, 478.
 - 6. When this Court preferable, *id.*
- Secondly*, Where they have no jurisdiction, *id.*
- Thirdly*, Course of proceeding in, 481.
 - I. *Plenary* causes enumerated, 481, 482.
 - parties thereto, 482.
 - process in, *id.*
 - form of citation, 491.
 - process to compel appearance to citation, &c., see 2 & 3 W. 4, c. 93, omitted by mistake in page 482.
 - libel, 482.
 - form of, 491.
 - answer in, 482,
 - witnesses in, 483.
 - sentence in, *id.*
 - practical proceedings in, 485.
 - for defamatory words, 486, 467 to 472.
 - form of citation for, 486.
 - form of libel in Consistory Court of London for, 487.
 - for restitution of conjugal rights, 487, 460.
 - for nullity of marriage, 488, 459.
 - for a divorce, 489.
 - for subtraction of tithes, 490, 456.
 - appeal therein from Diocesan to Arches Court, 490.
 - form of citation, 491.
 - form of libel, *id.*
 - for subtraction of church rates, 491, 472.
 - contempts of Ecclesiastical Court by non appearances, &c. see 2 & 3 W. 4, c. 93, omitted by mistake in pages 482, 484, 485.
 - II. Right of intervention in, 492.
- II. Of the several Ecclesiastical Courts, 494.
 - in general, *id.*
 - 1. Archdeacon's Court, 495.
 - 2. Consistory Court, *id.*
 - 3. Court of Peculiars, *id.*
 - 4. Arches Court, 496.
 - jurisdiction of, under letters of request, 497.
 - form of, *id.*
 - as a Court of Appeal, 498.
 - mode of recovering a legacy in, 498, 466.
 - 5. Prerogative Court, 500.
 - proceedings to obtain probate or letters of administration, *id.*
 - form of probate, 501.
 - of letters of administration, 500.
 - entering caveat, 502.
 - form of caveat, *id.*
 - obtaining inventory, *id.*
 - of administration bond, *id.*
 - proceedings on caveat, 503.
 - contesting validity of will, *id.*
 - observations relating to, 504.

ECCLESIASTICAL COURTS—continued.

application for assignment of bond, 505.

action thereon, *id.*

6. Court of Faculties, *id.*

ECCLESIASTICAL DUES.

suits for, 457.

ECCLESIASTICAL OFFENCE.

jurisdiction of Courts over, 475

ECCLESIASTICAL OFFICERS.

jurisdiction of Court over, 475

ECCLESIASTICAL WASTE.

suits for, 457.

ELECTION PETITIONS.

costs of, recovered summarily, 340

certificate of Speaker of House of Commons conclusive as to amount, 341

operates as a warrant of attorney, *id.*

EQUITY, COURTS OF, (See "*Chancery*," "*Exchequer*," "*Master of the Rolls*," "*Vice Chancellor*."')

jurisdiction of Courts of, 308

officers in Courts of, 317

extensive privileges in favour of, *id.*

may send case for opinion of Courts of law, 350

or direct an issue to be tried there, 352

of Courts of equity in general, 403 to 405

jurisdiction and proceedings generally the same, 443

appeal from, 508, 593

ERROR, COURTS OF. See "*Appeal, Courts of*."

jurisdiction and enumeration of, 308, 309, 567

recent enactments respecting, 308

practice in cases of, materially altered, 568

jurisdiction of K. B. in cases of, from inferior Courts, 350, 360

writ of error from inferior Court is not returnable in Common Pleas, 388.

doubted whether error in fact examinable in Exchequer Chamber or House of Lords, 572, 592

three principal Courts of, 567

1. Exchequer Chamber, 567, 568. See "*Exchequer Chamber*."

from what Courts, 567

enactments of 1 W. 4, c. 70, s. 8, 568

review of former law, 568 to 574

2. Judicial Committee of Privy Council, 575. See "*Privy Council*."

jurisdiction of, 573

enactments of, 3 & 4 W. 4, c. 41, 573 to 582

orders in council, 582, 583

3. House of Lords, 585. See "*House of Lords*."

jurisdiction of, 585

from what Courts error sustainable, 589 to 597

course of proceedings in, 597

practice on appeals, 601

ERROR, writ of,

removal unto K. B. by, 374

course of proceedings in the House of Lords, 597

EXCHEQUER CHAMBER, COURT OF.

jurisdiction of, 308, 567

error from, 309

how constituted, 568, 569

is merely a Court of error from Superior Law Courts, 567

enactments of 1 W. 4, c. 70, respecting, 568

previous practice in cases of error altered, *id.*

in what cases error lies in, 570, 571

practice in cases of, *id.*

cannot investigate the merits upon matter of fact, 571

when error does not lie to, 570, 571

will not inquire into practice of Courts below, 572

or discuss facts in a bill of exceptions, unless objection expressly raised before the judge, and stated in the bill of exceptions, 577, 578, 592

EXCHEQUER OF PLEAS, COURT OF.

- jurisdiction of, co-extensive with other Law Courts in *personal* actions, 314
- exceptions as respects its officers, &c. 315
- peculiar jurisdiction in revenue cases, 316
- revenue and Law Courts of, 389
- the Exchequer of Pleas, 390
 - when jurisdiction exclusive, 392
 - no jurisdiction in real or mixed actions, 392
 - excepting ejectment, *id.*
 - in cases of feigned issues, *id.*
 - summary jurisdiction of, 393
 - by habeas corpus, *id.*
 - over warrants of attorney, *id.*
 - over its own officers and attornies, 394
- practice in outlawry, *id.*
- in quo warranto, 395
- in prohibition, 396
- removal of civil suits from inferior Courts, *id.*
- proceedings on recognizances, *id.*
- on newspaper recognizances, 398
- over writs of extent in aid, 398
- in recovery of legacy duties, 399
- or taxes, 400
- or customs duties, &c. 401
- jurisdiction exclusive in informations in cases of seizure, *id.*
- and petitions of right, 402
- crown practice in, *id.*
- no jurisdiction over criminal matters, 403
- except collaterally, *id.*

EXCHEQUER, EQUITY SIDE OF COURT OF, 450

- jurisdiction and practice of, 450
- formerly a mere Revenue Court, *id.*
- advantages of filing a bill in equity in, 452
- jurisdiction in tithe cases, *id.*
- in parochial matters, 453
- may issue writ of ne exeat, *id.*
- its exclusive jurisdiction, *id.*
 - in cases relating to Crown property, *id.*
 - and superstitious uses, *id.*

EXECUTORS. See "Ecclesiastical Courts."

- jurisdiction of Courts of Equity over, 423, 424

EXECUTRIX.

- form of probate to, 501

EXTENT, WRIT OF.

- proceedings in Exchequer by, 398

FACT, ERROR IN.

- no writ of error for, lies to Exchequer Chamber or House of Lords, 570
- doubted whether there are not exceptions, 592

FACULTIES, COURT OF.

- jurisdiction of, 507

FEIGNED ISSUE.

- trial of, 352, 579
- trial of, in Exchequer, 392
- or K. B. 352
- in Privy Council, 579, 580

FIAT. See "Bankruptcy, Court of."

- issuing of London fiat, 541
- of country fiat, 542
- analysis of 1 & 2 W. 4, c. 56, 542 to 550
- other enactments respecting, 550, 551
- rules and orders, 551
- present course of proceeding to obtain fiat, 555
 - forms of proceedings, 556 to 558. See "*Forms.*"
- decisions as to concerted fiat, 559
- consequences of defective description in, 559
- proceedings after obtaining fiat, 560
 - private meeting to open fiat 561
- advertisement of, in Gazette, 563

FINES AND RECOVERIES,

exclusive jurisdiction of C. P. over, 383.
recent enactments respecting, *id.*

FLOTSAM.

jurisdiction of Court of Admiralty over, 511.

FORFEITURES.

bills for relief against, 417.

FORMS.

of citation in suit for defamation, 486.
of libel for defamation, 487.
of citation for subtraction of tithe, 491.
of libel for same, *id.*
of letters of request for instituting suit for divorce, 498.
of probate of a will, 501.
of letters of administration, *id.*
of affidavit of sureties justifying under, 503.
of affidavit to lead warrant of arrest of ship for mariner's wages, 533.
of warrant thereon, *id.*
of summary petition or libel for wages, 534.
of certificate annexed to same, 534.
of another like certificate, *id.*
of allegation on behalf of owner of ship in a cause of subtraction of wages shewing mutinous behaviour, &c. 535.
of like allegation, *id.*
of warrant to arrest ship for salvage, *id.*
of warrant to arrest master of ship for a sea battery, *id.*
of petitioning creditor's affidavit on which to petition for fiat, 536.
of affidavit to obtain country fiat, *id.*
of petitioning creditor's bond, *id.*
of bond to obtain country fiat, 557.
of petition for London fiat, 558.
of petition for country fiat, *id.*
of fiat in town bankruptcy, *id.*
like, more concise, *id.*
of country fiat, *id.*
like, more concise, *id.*
of memorandum of commissioner having qualified, 562.
of oath to commissioners, *id.*
of adjudication, *id.*
of proof of debt by creditor, 565.
of affidavit on which to prove debt, *id.*
of memorandum of choice of assignees and their acceptance of office, 566.

FORNICATION.

punishable in Ecclesiastical Court, 477.

FRAUDS.

jurisdiction of Chancellor in cases of, 411 to 413.
either to prevent or redress, 411.

GAZETTE.

advertisement of fiat in, 563.

GENERAL RULES.

power of Court of Review to make, 545, 551.

GOODS.

suit for restitution of, when illegally taken, 517.

GRAMMAR SCHOOLS.

jurisdiction of Ecclesiastical Courts over, 475.

HABEAS CORPUS.

jurisdiction of Court of K. B. by, 327.
of C. P., by, 386.
of Exch. by, 393.

HOUSE OF LORDS.

jurisdiction of, 585.
its appellate jurisdiction, *id.*
1. General observations respecting it, *id.*
is the highest Court of appeal, 586. !

HOUSE OF LORDS—continued.

- how constituted, 586, 587.
- defective state of, *id.*
- observations of Lord Chancellor Brougham respecting, 587.
- 2. From what Courts writs of error and appeal lies to, 589.
 - 1. From Courts in England, 590.
 - 1. Of Law, 590.
 - 2. Of Equity, 593.
 - 2. From Courts in Scotland, 595.
 - 3. From Courts in Ireland, *id.*
 - 4. Not from islands or other foreign Courts, 596.
- 3. Practice and course of proceedings in, 596 to 604.

HYPOTHECATION.

- jurisdiction of Court of Admiralty in cases of, 526, 527.

INCEST.

- nullity of marriage on account of, 489.
- proceedings in suit on account of, *id.*

INDICTMENT.

- original jurisdiction of King's Bench by, 362, 363.
- removal of, from inferior Courts, 368.

INFANTS.

- jurisdiction of Courts of Equity over interests of, 421.

INFERIOR COURTS.

- no writ of error from, returnable in C. P., 338
- jurisdiction of superior Courts on appeal from, 312, 350, 351.
- how controlled, 312, 350.
- when aided, 350, 353.
- appeal from decisions of, 312, 350, 351.
- removal of indictments from, 368, 388, 396.
- of judgments by writ of error, 374, 388, 396.

INJUNCTION. See "Chancery, Court of."

- jurisdiction of Courts of Equity by, to prevent injuries in general, 414.
- to prevent actions or proceedings at law, *id.*
- or setting up outstanding term, 417.
- or other legal but unjust defences, *id.*
- when Equity side of Exchequer the preferable Court, 452.

INJURY.

- prohibition from K. B. to prevent, 358.

INSTANCE COURT, 508. See "Admiralty, Court of."**INTERPLEADER ACT.**

- jurisdiction of King's Bench under, 341.
- operation of act, *id.*
- as regards sheriffs, *id.*
- in other cases, 343 to 346.
- jurisdiction of Courts of Equity independently of statute, 417.

INTERPLEADER, BILL OF.

- jurisdiction of Court of Equity by, *id.*
- of Court of King's Bench, 341 to 346.

INTERROGATORIES.

- examination of witnesses on, 346, 421.
- power formerly only in Court of Equity, 346.
- now extended to Courts of Law, *id.*
- enactments respecting, *id.*
- decisions thereon, *id.*

INTERVENTION, RIGHT OF.

- by third party, in Ecclesiastical Suits, 492.
- the like, in Mayor's Court, *id.* note (y).
- but unknown in Courts of Law and Equity, *id.*

INTESTATE.

- form of letters of administration to widow of, 501.

IRELAND, COURTS OF.

- writ of error or appeal from, to House of Lords, 595.
- except from Instance Court of Admiralty, 596.
- then to Judicial Committee of Privy Council, *id.*

ISSUE.

- power of Courts of Equity to direct trial of, 352.

ISSUE—continued.

- power of Privy Council to direct trial of, 579.
- Court of Review to direct trial of, 547, 549.

JACTITATION OF MARRIAGE.

- suits for, in Ecclesiastical Court, when or not sustainable, 459, 488.

JETSAM.

- jurisdiction of Court of Admiralty over, 511.

JUDICIAL COMMITTEE OF PRIVY COUNCIL, 573. See "Privy Council."**JUDGMENT.**

- in criminal cases, when now given at trial, 566.

JURISDICTION. See "Courts."**I. Of the Courts in general, 301.**

- division of, and general utility, 301, 302.
- reasons for division, and distinct jurisdiction of, 304.
- knowledge of the jurisdiction of each Court essential, 302.
- attempts of Courts to extend, how controlled, 307.
- consequences of wrongfully assuming it, *id.*
- principal distinctions between the jurisdiction of each Court, 310.
- where debt or damages are small, 318.

II. Outline of the jurisdiction of each Court, 311 to 324.**III. Jurisdiction and practice of the Court of King's Bench, 324 to 382. See "King's Bench."****IV. Of the Common Pleas, 382 to 389. See "Common Pleas."****V. Of the Exchequer of Pleas, 389 to 405. See "Exchequer."****VI. Of Court of Chancery and Chancellor, 405 to 443. See "Chancery" and "Chancellor."****VII. Of the Master of the Rolls, 443 to 445. See "Master of the Rolls."****VIII. Of the Vice-Chancellor, 446 to 450. See "Vice-Chancellor."****IX. Of the Equity side of Exchequer, 450 to 454. See "Exchequer."****X. Of Ecclesiastical Courts, 454 to 508. See "Ecclesiastical Courts."****XI. Of the Court of Admiralty, 508 to 538. See "Admiralty."****XII. Of the Prize Court, 538 to 540. See "Prize Court."****XIII. Of the Court of Bankruptcy, 540. See "Bankruptcy."****XIV. Of Courts of Error and Appeal, 567 to 604. See "Error" and "Appeal."****1. Court of Exchequer Chamber, 568 to 573. See "Exchequer Chamber."****2. Judicial Committee of the Privy Council, 573 to 585. See "Privy Council."****3. The House of Lords, 585 to 604. See "House of Lords."****JUSTICES OF PEACE. See "Certiorari."**

- jurisdiction as to seamen's wages, 526.

- salvage, 528.

KING'S BENCH, COURT OF, 324.

- jurisdiction and general practice of, 308, 324 to 382.

I. Over Civil matters, 325 to 362.**1. Formal Actions.**

- 1. Personal actions, 325.
- 2. Only one mixed action, ejectment, 326.
- 3. Not over real actions, *id.*

2. Summary jurisdiction, *id.*

- as by habeas corpus, 327.
- over awards, 328.
- over annuities, 329.
- mortgage deeds, 331.
- bail-bonds and replevin-bonds, 333.
- warrants of attorney, 333 to 337.
- over the different officers of the Court, *id.*
- attorneys and articulated clerks, 338.
- over costs of election petitions, 340.

3. In furtherance of its own jurisdiction, 341.

- under Interpleader Act, 1 & 2 W. 4, c. 58, s. 6, 341.
- relief to sheriffs, *id.*
- relief at law in other cases, 343.
- under Commission and Interrogatory Act, 1 W. 4, c. 22, 346.
- when or not may compel a discovery, 348.
- only on summary proceedings, 349.
- summary proceedings to prevent abuse of the authority of the Court, *id.*
- or other vexatious proceedings, *id.*

4. In aid of civil jurisdiction of other Courts, as, by compelling them to act, 350.

KING'S BENCH, COURT OF—continued.

- restraining them from acting, 350, 351.
- on appeal from their decision, *id.*
- answering a case from Court of Equity, 350.
- or trying an issue from such Court, 352.
- in aid of inferior Courts, 353.
- general utility of writ of certiorari into King's Bench, *id.*
- controul over, by mandamus, 354.
- by prohibition, 355. See "*Prohibition.*"
- as a Court of Appeal, 360.
 1. *Formally*, as by a writ of error or false judgment, *id.*
 2. *Summarily*, as between landlord and tenant, &c. 361.
 3. As a Court of Appeal in other cases, *id.*

II. Over criminal and public matters, 362,

- in general, *id.*
- by indictment, 363.
- by criminal information, *id.*
- alteration of practice in giving judgment immediately after trial, 366.
- by articles of the peace, 367.
- by quo warranto, *id.*
- as a Court of Appeal, 368.
 - by removal of indictments, &c. from inferior Courts, *id.*
 - by writ of error, 374.
 - by certiorari to remove convictions, &c. *id.*
 - or coroners' inquests, *id.*
 - quære remedy when certiorari taken away, 376.
 - regulation of certiorari to remove convictions, &c. *id.*
 - enactments respecting, 376, n.
 - practice, 378.
 - by removal of proceedings before Commissioners of Sewers, 379.
 - upon cases stated by Courts of Session, 380.
 - either upon poor rates, 382.
 - or other assessments, *id.*
 - from orders of removal, 382, 383.

LANDLORD AND TENANT.

- appeal from justices' decision, 361.

LEGACIES. See "*Ecclesiastical Court.*"

- jurisdiction of Courts of Equity over, 424, 436, 466.
- of Ecclesiastical Courts, 466, 498.
- recovery of, in Arches Court, *id.*
- wife to sue separately for, there, 467.

LEGACY DUTIES.

- recovery of, in Exchequer, 398.

LEGATEES. See "*Ecclesiastical Courts,*" and "*Legacies.*"

- jurisdiction of Courts of Equity over, 424, 436, 466, 498.
- Ecclesiastical Courts over, 466, 498.

LETTERS OF ADMINISTRATION, 500. See "*Prerogative Court,*" "*Administration, Letters of.*"**LETTERS OF REQUEST.**

- jurisdiction of Arches Court under, 497.
- form of, 498.
- practice as to, 497.

LEWDNESS.

- punishable in Ecclesiastical Court, 477.

LIBEL.

- form of, for defamation, 487.
- for subtraction of tithes, 491.
- for arrear of seamen's wages, 534.

LIGAN.

- jurisdiction of Court of Admiralty over, 511.

LIMITATION.

- of suits in Ecclesiastical Court, 478.
- of Appeals, 578.
- of writs of error twenty years, 597.

LONDON FIAT. See "*Bankruptcy,*" "*Fiat.*"

- issuing of, 541.
- balloting of commissioner for, 546.

LORD OF A MANOR.

bill to compel him to hold a Court, 421.
 mandamus usually preferred, 421, vol. i. 792, 794.
 Bill in equity against lord when filed, 421.

LORDS, HOUSE OF. See "*House of Lords.*"

jurisdiction of, 585 to 604.

LOST DEEDS.

jurisdiction of Chancellor in cases of, 408.

MANDAMUS.

jurisdiction of King's Bench by writ of, 354. Vol. i. 792 to 794.
 has exclusive jurisdiction, *id.*
 extension of remedies by, suggested, 354.

MARINER'S WAGES, 520. See "*Admiralty, Court of.*"**MARRIAGES.** See "*Ecclesiastical Courts.*"

when Court of Equity has no jurisdiction over, 434.
 suits for matrimonial causes, 458.
 for jactitation of, 459.
 nullity of, *id.*
 restitution of conjugal rights, 460.
 divorces, 461.
 alimony, 462.
 costs pending suit, *id.*

MARSHALLING ASSETS, 421.

bill for, *id.*

MASTER OF THE ROLLS, COURT OF.

jurisdiction of, 443 to 446.
 settled by 3 G. 2, c. 30, 444.

MINISTERS.

jurisdiction of Ecclesiastical Courts over, 475.

MISTAKE.

jurisdiction of Chancellor in remedying, 408.

MIXED ACTIONS.

jurisdiction of Court of King's Bench over, 326.
 must be brought in Common Pleas excepting only ejectment and quare impedit
 by the King, 326, 383.
 Exchequer has no jurisdiction over, 392.
 except ejectment, *id.*

MODUS.

bill to establish, 420.
 when existence of admitted arrear is recoverable in Ecclesiastical Court, 456.
 composition, arrear of, recoverable in Ecclesiastical Court, 456, 7—490, 491, n. (x).

MORTGAGE DEEDS.

jurisdiction of King's Bench over, 331.
 of Common Pleas over, 387.
 enactments respecting, 331, 332.

MORTGAGEE OF A SHIP.

when Admiralty Court will not interfere in favour of, 532.

MUTINOUS CONDUCT. See "*Seamen's Wages.*"

allegation of master shewing, 535.

NE EXEAT REGNO.

Court of Exchequer may grant orders in nature of writ of, 453.

NEWSPAPERS.

proceedings in Exchequer on recognizances, 398.

NULLITY OF MARRIAGE. See "*Ecclesiastical Courts.*"

suits for, 458, 459, 488, 489.

OFFICERS.

summary jurisdiction of Courts over, 338, 387.

OFFICIAL ASSIGNEE.

appointment of, 547, 563.
 property of bankrupt vests in, 547.
 how balloted for, 548.

ORDERS.

removal of, by certiorari, 374.

OUTLAWRY.

jurisdiction of Exchequer in cases of, 394.

OUTSTANDING TERM.

injunction to prevent setting up of, 417.

PARLIAMENT.

jurisdiction in cases of appeal, 309.

election petitions, summary proceeding for costs of, 340, 341.

PARTITION.

bills for, between joint tenants, &c. 420.

writ of, abolished at law, *id.*

PART-OWNERS.

jurisdiction of Court of Admiralty between, 517.

PEACE, BILLS OF.

jurisdiction of Court of Equity by, 416.

PECULIARS, COURT OF.

jurisdiction of, 495.

appeal from, 496.

PERJURY.

punishment for, before Privy Council, 579, 582.

PETITION.

form of, to obtain fiat, 558.

in country bankruptcy, *id.*

in town bankruptcy, *id.*

PETITIONING CREDITOR.

proceedings before commissioners, 546.

forms of affidavits to obtain fiat, 556.

form of bond, *id.*

PETITION OF RIGHT.

trial of, in Exchequer, 402.

PEWS.

disturbance of, 472.

suit in Ecclesiastical Court for, *id.*

PILOTAGE.

suits for, in Admiralty Court, 526.

PLENARY CAUSES, 481. See "Ecclesiastical Courts."**POOR RATE.**

jurisdiction of King's Bench respecting, 380.

case from sessions, *id.*

POSSESSION.

of a ship, suit for, 516.

PREROGATIVE COURT.

jurisdiction of, 500.

appeal from, *id.*

obtaining probate in, *id.*

or letters of administration, *id.*

form of probate, 501.

forms of letters of administration, *id.*

entering caveat in, 502.

form of caveat, *id.*

obtaining inventory or declaration, *id.*

administration bonds, *id.*

sureties to bond, *id.*

justification of, *id.*

affidavit of, 503.

observations relating to suits in, 504.

application for assignment of bond, 505.

action thereon, *id.*

PRESENTMENT.

removal of, into King's Bench, 369.

PRIVATE INJURIES.

jurisdiction of Ecclesiastical Courts over, 455.

PRIVY COUNCIL. *Judicial Committee of.*

jurisdiction of, in appeal cases, 509.
 appeal from Admiralty to, 512.
 Court of, how constituted, 573, 574.
 enactment in 3 & 4 W. 4, c. 41, respecting, 573 to 58 .
 from what Courts appeal lies to, 576.
 in what cases appeal lies, 577.
 time of appealing to, 578.
 mode of convening witnesses before, 579.
 of production of documents, *id.*
 punishment for contempts, *id.* 582.
 for perjury of witnesses, *id.*
 mode of examining witnesses, 579.
 re-examination of, *id.*
 power to direct feigned issue, *id.*
 trial of same, 580.
 directions as to witnesses and evidence, *id.*
 observations thereon, *id.*
 power over costs of appeal, *id.*
 decrees of, to be enrolled and copies taken, 581.
 decrees on appeals from abroad, how enforced, *id.*
 power to punish for contempts, &c. 582.
 power of king to appoint registrar, *id.*
 right of registrar of Court of Admiralty to attend, *id.*
 regulations in treaties preserved, *id.*
 orders in council of, *id.* 583.
 other matters relating to, 583.
 course of proceedings in, 584.

PRIZE COURT.

jurisdiction of, 538, 539.

PROBATE. See "*Prerogative Court.*"

proceedings to obtain, 500.
 form of, 501.
 entering caveat to prevent grant of, 502.
 proceedings thereon, 503.
 contesting validity of will, *id.*
 observations relating to, 504.

PROHIBITION.

jurisdiction of King's Bench by writ of, 355.
 other Courts may issue it, *id.*
 when it issues, 355 to 360.
 how and to whom directed, 356 to 357.
 enactments of 1 W. 4, c. 21, respecting, 356.
 to prevent injury, suggested extension of, 358.
 jurisdiction of Common Pleas by, 388.
 of Exchequer by, 396.

QUO WARRANTO.

jurisdiction of King's Bench by, 367.
 of Exchequer by, 395.

REAL ACTIONS.

Court of King's Bench has no *original* jurisdiction over, 326.
 unless at the suit of the king, *id.*
 jurisdiction of Common Pleas over, 382.
 Exchequer has no jurisdiction over, 392.

RECOGNIZANCES.

proceedings on, in Exchequer, 396.
 in cases of newspapers, 398.

REGISTRARS.

appointment of, 544.
 of Judicial Committee of Privy Council, how appointed, 582.

RELIEF.

- against forfeitures, bills for, 417.
- when damages small, Court of Equity will not interfere, 439.

REMOVAL.

- cases respecting orders of, from sessions, 380.
- jurisdiction of King's Bench over, 380.

REPLEVIN BONDS.

- summary jurisdiction of King's Bench over, 333.
- of Common Pleas over, 387.

REQUESTS, LETTERS OF, 497, 498. See "Letters of Request."**RESTITUTION.**

- of conjugal rights, proceedings for, 487.

REVENUE, COURT OF, 398. See "Exchequer, Court of."**REVENUE OFFICERS.**

- jurisdiction of Court of Exchequer over, 324.

REVIEW, COURT OF.

- jurisdiction of, 542.
- how constituted, *id.*
- four judges of, at first appointed, *id.*
- now only three, *id.*
- have same jurisdiction as Chancellor formerly had in bankruptcy, 543.
- course of proceeding in, *id.*
- decision of, final, *id.*
- except on appeal to Chancellor or House of Lords, *id.*
- may direct an issue, 544.
- costs in discretion of court, *id.*
- Sub-division Courts of, *id.*
- oaths of judges, *id.*
- appointment of registrars, *id.*
- admission of attornies in, *id.*
- power to make rules and orders, 545.
- issuing of fiat, *id.*
- appointment of London commissioner, 546.
- commissioners' oaths, *id.*
- adjudging party a bankrupt, *id.*
- proceedings when bankruptcy disputed, 547.
- appointment of official assignees, *id.*
- how balloted for, 548.
- proof of debts, *id.*
- trial by jury of existence of a debt, 549.
- appeal to, from Sub-division Court, *id.*
- thence to Chancellor, *id.*
- appeal to the House of Lords, 550.
- rules and orders by, 551 to 555.

ROLLS, MASTER OF, 443. See "Master of the Rolls."**RULES AND ORDERS.**

- power of Court of Review to make, 545, 551.

SALVAGE.

- suits and proceedings for, 528.
- jurisdiction of Court of Admiralty in cases of, *id.*
- warrant to arrest ship for, 535.

SCOTLAND, COURTS OF.

- appeal from, to House of Lords, 595.

SEA BATTERY.

- suit for, in Admiralty, 512.
- warrant to arrest master for, 533.

SEAMEN'S WAGES.

- jurisdiction of Courts of Admiralty in suits for, 520.
- arrest of ship for, 520 to 526.
- forms respecting, 533. See "*Forms.*"
- summary remedy before justices, 526.

SEIZURES.

exclusive jurisdiction of Exchequer in cases of, 401.

SERJEANTS-AT-LAW.

exclusive privilege of, abolished, 385.

SESSIONS.

jurisdiction of King's Bench in cases stated by, 380.

SETTLEMENTS.

jurisdiction of King's Bench over cases from sessions, 380.

SEWERS, COMMISSIONERS OF.

jurisdiction of King's Bench over, 379.

removal of proceedings by, *id.*

SHERIFFS.

summary jurisdiction of King's Bench over, 337.

relief to, by interpleader act, 341.

SHIPS. See "*Admiralty, Court of.*"

jurisdiction of Court of Admiralty respecting, 512.

suits for a sea battery in, *id.*

for collision of, 513.

for possession of, 516.

for restitution of goods illegally taken in, 517.

between part-owners of, *id.*

for wages of seamen, 520.

for pilotage of, 526.

on bottomry bonds, *id.*

for salvage of, 528.

in cases of wreck, 531.

forms respecting, 533. See "*Forms.*"

SOLICITATION.

of chastity, how punished, 478.

SOLICITORS.

summary jurisdiction of Courts of Equity over, 432.

SPEAKER.

certificate of House of Commons in election petition, 341.

operation of, *id.*

SPECIFIC PERFORMANCE.

jurisdiction of Courts of Equity to compel, 422.

SPECIFIC RELIEF.

jurisdiction of Courts of Equity to enforce, 422.

SPIRITUAL COURT. See "*Ecclesiastical Court.*"

jurisdiction of, 308.

SPOLIATION.

suits for, in Ecclesiastical Court, 457.

STRIKING.

in a church or church-yard, how punished, 476.

SUBDIVISION COURTS. See "*Review, Court of.*"

jurisdiction of, 544.

how formed, *id.*

appeal from, 549.

SUBTRACTION.

suits for subtraction of tithes, 456, 457, 490, 491, note (z).

of church-rates, 472 to 475, 491.

of seamen's wages, 520, 535.

SUMMARY JURISDICTION.

of Court of King's Bench, 326 to 340.

to prevent abuse of authority of Court, 349.

SUPERSTITIOUS USES.

jurisdiction respecting, 453.

SURETIES.

liable in equity to contribute more extensively than at law, 303, and *id.* note (h).
justification of, to administration bond, 502.
form of affidavit, 503.

TAXES.

jurisdiction of Exchequer to recover, 400.

TENANT.

appeal from justices decision, 361.

TESTAMENTARY CAUSES. See "*Ecclesiastical Courts.*"

suits for, 464.
proceedings in obtaining or opposing grant of probate, 500 to 506.
caveat to prevent grant of probate, 500 to 502.

TIME.

of writs of error, twenty years, 597.
limitation of suits in Ecclesiastical Courts, 478.
of appealing to Judicial Committee of Privy Council how regulated, 578.

TITHES.

jurisdiction of Court of Exchequer over, 452.
of Ecclesiastical Courts, 456, 490.
subtraction of, 490.
proceedings for, 491.
form of citation, *id.*
of libel, *id.*

TORTS.

jurisdiction of Court of Admiralty in cases of, 512.

TREATIES.

regulations in, preserved in preference to Privy Council, 582.

TRUSTEES.

jurisdiction of Courts of Equity over, 423.

TRUSTS.

jurisdiction of Courts of Equity over, 423.

VICE-CHANCELLOR, COURT OF.

jurisdiction of, 446 to 450.
when created, 446.
enactment of 53 Geo. 3, c. 24, respecting, 446, 447.

WAGES. See "*Seamen's Wages.*"

suits for, 520.
arrest of ships for, 533.

WARRANT.

to arrest ship for arrear of seamen's wages, 533.
for salvage, 535.
master for a sea battery, *id.*

WARRANTS OF ATTORNEY.

summary jurisdiction of King's Bench over, 333 to 337.
of Common Pleas, in what differs, 336, 337, 387.
of Exchequer, former difference, 336, 393.

WILL. See "*Ecclesiastical Courts,*" "*Legacies,*" "*Prerogative Court,*" "*Testamentary Causes.*"

what amounts to a valid will of personal property, 464, 465.
when Court of Equity no jurisdiction over, 435.
testamentary causes in Ecclesiastical Courts, 464 to 466.
obtaining probate of, 500.
form of probate, 501.
caveat to prevent grant of probate of, 502.
form of caveat, *id.*
contesting validity of, 503.
testamentary causes in general, 464 to 467.
legacies, recovery of, in Ecclesiastical Courts, when advisable, 466, 498.

WITNESSES.

jurisdiction of Courts of Law respecting, 346, 421.
enactments of 1 W. 4, c. 22, 346, 347. .
commission to examine, 346, 421.
examination of, by interrogatories, 346, 347, 421.
mode of convening before Privy Council, 579.
punishment for perjury or contempt before, 579, 582.
mode of examining before, 579.
re-examination of, 579.

474

WRECK.

jurisdiction of Court of Admiralty in cases of, 531.

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